The Madras Law Journal

I] REPORTS [1976

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Ponnuswamy Nadar .. *Appellant**

v.

Narayanan Nadar ... *Respondent.*

(A) *Benami—Burden of proof—Tests of.*

The burden of proof lies heavily on the person who claims against the tenor of a deed, that is, the alleged beneficiary, to show that the ostensible owner was a mere name-lender and the property was in fact purchased only for his benefit. The burden would be discharged by satisfying the well-known criteria *viz.*: (1) the source of purchase-money relating to the transaction; (2) possession of the property ; (3) the position of the parties and their relationship to one another; (4) the circumstances, pecuniary or otherwise, of the alleged transferee; (5) the motive for the transaction; (6) the custody and production of the title deeds; and (7) the previous and subsequent conduct of the parties. Each of the abovesaid circumstances, taken by itself, is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other. But, a combination of some or all of them and a proper weighing and appreciation of their value would go a long way towards indicating whether the ownership has been really transferred or where the real title lies. In every benami transaction, the intention of the parties is the essence. The true test to determine whether the transaction is benami or not is to look to the intention of the parties *viz.*, whether it was intended to operate as such or whether it was meant to be colourable ; if colourable, the transaction is benami, otherwise the transaction is not benami. On the other hand if the parties intended that it should take effect, the transaction cannot be said to be benami. The issue cannot be disposed of by a mere conjecture or suspicion as to the various circumstances surrounding the transaction, since the very object of a benami transaction is secrecy.

[*Paras.* 7 *and* 8.]

(B) *Evidence Act (1 of 1872), section* 101.

Section 101 of the Evidence Act provides that any one who desires a Court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts, must prove that the facts exist. The evidence adduced in cases of this character should stand the test of strict scrutiny and satisfy the tests. In other words the evidence must be reliable and acceptable, impelling the Court to take a view contrary to the recitals in the impugned document. The consideration of such evidence should be in a proper manner and in the right perspective. [*Para.* 8.]

In order to determine the benami nature of a transaction, reliance must not only be placed on the surrounding circumstances and the position of the parties and other relations to one another, but also on the motive which governs their actions and subsequent conduct. In fact, the absence of motives does not decisively negative the benami nature, but it plays an important role.

[*Para.* 15.]

* Appeal No. 194 of 1971.

7th March, 1975.

Cases referred to :—

Minakumari Bibi v. *Bejoy Singh Dudhuria*, (1917) I.L.R. 44 Cal. 662 ; *Surasaibalini* v. *Phanindra Mohan*, (1965) I I.T.J. 526: (1965) 1 S.C.J. 583 : A.I.R. 1965 S.C. 1364; *Abdul Latif Kazi* v. *Abdul Huq Kazi*, (1925) 28 C.W.N. 62.

Appeal against the decree of the Court of the Subordinate Judge of Nagercoil in Original Suit No. 43 of 1968 dated 30th June, 1970.

S. Chellaswamy, for Appellant.

P. Anantha Krishnan Nair, for Respondent.

The Judgment of the Court was delivered by

Ratnavel Pandian, J.—This appeal has been preferred by the unsuccessful plaintiff in O. S. No. 43 of 1968 on the file of the Subordinate Judge, Nagercoil. The said suit was filed by him for declaration of his title to and possession of the plaint schedule property and a permanent injunction restraining the defendant from interfering with his possession, and if the defendant managed to get possession by force and was found to be in possession for directing him to deliver possession of the property to the plaintiff with mesne profits after giving declaration of title, and for costs.

2. The plaint allegations were as follows : The plaint schedule property is a portion of S. No. 1398/65-A in Kaliel Village, the total extent of which is 250 acres. The said 250 acres belonged to one Mr. Mohamed Mustaffa, son of Masthan Rowther. He executed an agreement of sale dated 16th September, 1957 in favour of the plaintiff in respect of the said 250 acres, for a total consideration of Rs. 62,500 and the plaintiff also paid an advance of Rs.1,801 to Mustaffa. From the time of the said agreement, the plaintiff was requesting Mustaffa to give the property on sale for a total consideration of Rs. 50,000 which request Mustaffa also promised to consider, and it was under the said circumstances the consideration was recited as Rs. 62,500 in the agreement. The defendant was an intimate friend of the plaintiff and he was also a lessee of Mustaffa. While, so, upto 25th September, 1958 the plaintiff had paid to Mustaffa total sum of Rs. 27,876. Sometimes, the plaintiff had sent amounts to Mustaffa through the defendant. By that time, Mustaffa also was pleased to reduce the sale amount to Rs. 50,000. Because of the confidence in Mustaffa, the plaintiff also did not get any receipts, excepting a few receipts obtained in the name of the defendant and those receipts are with the defendant. The plaintiff is a Government servant and he retired on 7th December, 1967. So, he requested Mustaffa to execute a sale deed ostensibly in the name of the defendant. So, on 29th September, 1958 Mustaffa executed a sale deed in the name of the defendant. On the date of sale, the plaintiff made three separate payments of Rs. 1,600, Rs.2,000 and Rs. 524. After the date of sale, the plaintiff has also paid to Mustaffa various sums, totalling Rs. 18,000. While so, in October, 1958, when the plaintiff met Mustaffa, he wanted to verify the account regarding the amounts paid till then. On reconciliation, it was found that a sum of Rs.524 had not been credited by Mustaffa. Mustaffa promised to rectify the accounts. Even regarding the payments made after 29th September, 1958, the plaintiff had paid some amounts through the defendant. Even after the agreement of sale, the plaintiff had begun negotiations with various persons to sell various portions of the property. Even on the date of sale executed by Mustaffa, the plaintiff made the defendant execute a sale in favour of one Joseph Muthian with regard to an extent of 9 acres. On the same day, the plaintiff caused a formal sale to be executed by the defendant in favour of the plaintiff himself in respect of 25 acres. In the said 25 acres, the plaintiff had already planted in June, 1958 rubber, with the knowledge and consent of Mustaffa. The said 25 acres were taken in order to enable him to make an application for licence. Apart from the two sale deeds abovementioned, the plaintiff caused the defendant to execute five more sale deeds in that year. In the year 1959, the plaintiff brought about altogether ten sale deeds and according to the directions of the plaintiff, the defendant executed those sale deeds. In 1960, as per the plaintiff's directions, the defendant executed three more sale

deeds. An extent of 45 acres 20 cents, described in the plaint schedule, stands ostensibly in the name of the defendant. Because of confidence, the plaintiff did not take care to have the sale deed dated 29th September, 1958 obtained from Mustaffa and the tax receipts, with him. The plaintiff has also spent a lot of money on the plaint schedule property for planting rubber. Through the defendant also, a lot of money has been spent. In addition to the above, the plaintiff has also paid to the defendant moneys for the friendship and work done by him for the plaintiff. The defendant had not spent any money of his own for getting the sale or for improving the property. While so, the plaintiff had reason to suspect some bad motive in the defendant. He asked the defendant to execute a formal deed acknowledging the benami nature of the document of sale of the year 1958, but the defendant refused. On 16th January, 1968 the plaintiff issued notice to the defendant demanding him to execute a formal deed, for which the defendant replied on 31st January, 1968 raising false and untenable contentions. Hence the suit. The plaintiff also alleged that the plaint schedule property would yield a profit of Rs. 2,000 per annum at the time of the presentation of the plaint.

3. The defendant filed a written statement contending as follows: The defendant purchased the entire property from Mustaffa on 29th September, 1958 with his own money and has become the owner thereof. The plaintiff acted only as a broker and on the same date 29th September, 1958 the defendant executed a sale deed in respect of 25 acres for Rs.2,000 in lieu of the work done by the plaintiff as a broker. The defendant is not aware of any transaction between the plaintiff and Mustaffa. He never took any money to Mustaffa for the plaintiff. The plaintiff did not make any payment to Mustaffa and he had nothing to do with the sale in favour of the defendant. On 29th September, 1958, the defendant sold 9 acres of land to a Joseph Muthian for Rs. 1,500. The plaintiff is estopped from denying the defendant's title. The defendant has executed various sale deeds to various parties out of his own volition and had received moneys therefore, and he is in possession of 45 acres 20 cents as owner and the plaintiff has no right over the same. The defendant planted rubber in about 25 acres and he has put up building. In the remaining area he has planted other trees and has spent more than Rs. 75,000. The plaintiff wanted the defendant to sell property and the defendant refused and so the plaintiff has filed this suit to blackmail him. The plaintiff is not entitled to any relief. The defendant denies all the other allegations made in the plaint.

4. On the above pleadings, the following issues were framed :

1. Whether the defendant is a benamidar for plaintiff of the suit properties ?

2. Whether the agreement with Mohamed Mustapha pleaded in paragraph 3 is true ?

3. Whether Mustaffa agreed to reduce the sale price to Rs. 50,000 at the request of plaintiff ?

4. Whether the consideration for the sale was paid by the plaintiff ?

5. Whether the sale deeds were executed by the defendant at the behest of plaintiff ?

6. Whether plaintiff is estopped from denying the title of defendant ?

7. Whether the improvements in the suit property were effected by plaintiff or defendant ?

8. To what relief is plaintiff entitled ?

9. What is the order as to costs ?

5. On a consideration of all the documents filed in the case and the evidence adduced by the parties, the learned Subordinate Judge found all the issues against the plaintiff and dismissed the suit. Hence, the plaintiff has filed this appeal.

6. Mr. Chellaswami, learned counsel for the appellant, mainly contends that the purchase of the properties was only benami in the name of the respondent for his benefit, and that he obtained Exhibit B-1, the sale deed dated 29th September, 1958, from Mohamed Mustaffa, the vendor, in the name of the respondent. According

to the appellant, he paid the sale price to the vendor and as such the respondent has no manner of right over the suit properties. Therefore, the crucial question or the crux of the case is whether Exhibit B-1 is a benami transaction or not.

7. In *Minakumari Bibi* v. *Bejoy Singh Dudhuria*[1]. Sir Lawrence Jenkins, has observed that though in cases of alleged benami transactions, there may be a ground for suspicion yet a Court's decision must rest not on suspicion or conjecture, but upon legal grounds established by legal testimony. In cases of this character, the determination of the question depends not only on direct oral evidence but also upon circumstances and surroundings of the case concerned. It has been held repeatedly that the burden of proof lies heavily on the person who claims against the tenor of the deed, that is, the alleged beneficiary, to show that the ostensible vendee was a mere name-lender and the property was in fact purchased only for his benefit. Such burden would be discharged by such a plaintiff by satisfying the well-known criteria *viz.*, (1) th source of purchase money relating to the transaction; (2) possession of the property; (3) the position of the parties and their relationship to one another; (4) the circumstances, pecuniary or otherwise, of the alleged transferee; (5) the motive for the transaction; (6) the custody and production of the title deeds; and (7) the previous and subsequent conduct of the parties. Each of the above-said circumstances, taken by itself, is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other. But a combination of some or all of them and a proper weighing and appreciation of their value would go a long way towards indicating whether the ownership has been really transferred or where the real title lies. In every benami transaction, the intention of the parties is the essence. The true test to determine whether the transaction is benami or not is to look to the intention of the parties *viz.*, whether it was intended to operate as such or whether it was only meant to be colourable; if colourable, the transaction is benami, otherwise the transaction is not benami. On the other hand if the parties intended that it should take effect, the transaction cannot be said to be benami.

1. (1917) I.L.R. 44 Cal. 662.

8. In *Surasaibalini* v. *Phanindra Mohan*[1] it, has been held as follows :

> "The Court will presume an ostensible title to be the real title unless a plaintiff who seeks to assert the contrary pleads and proves that the ostensible owner is not the real owner. In other words, the onus is on the person who alleges a transaction to be benami to make it out. Of course, the source of the funds from which the purchase is made, coupled with the manner of its enjoyments, would be a real material factor for establishing the case of benami, but the mere proof of the source of the purchase-money would not finally establish the benami nature of the defendant's title. Even where a plaintiff purchases property with his own funds in the name of *B*, the surrounding circumstances, the mode of enjoyment, might still indicate that it was intended to be a gift to *B*, and it would then not be a case of benami notwithstanding that the purchase money did not proceed from the defendant."

The principles relating to a benami transaction have been clearly laid down in *Abdul Latif Kazi* v. *Abdul Huq Kazi*[2] From the principles laid down in the decisions, it is clear that the person who impugns the apparent character of the transaction, *viz.*, the appellant herein, must show something or other by letting in legal evidence establishing that the transaction in question is a benami one, and the issue cannot be disposed of by a mere conjecture or suspicion as to the various circumstance surrounding the transaction, since the very object of a benami transaction is secrecy. Section 101 of the Evidence Act, provides that any one who desires a Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that

1. (1965) 1 I.T.J. 526 : (1965) 1 S.C.J. 583 : A.I.R. 1945 S.C. 1364.
2. (1925) 28 C.W.N. 62.

those facts exist. The evidence adduced in cases of this character should stand the test of strict scrutiny and satisfy the tests mentioned above. In other words, the evidence must be reliable and acceptable, impelling the Court to take a view contrary to the recitals in the impugned document. The consideration of such evidence should be in a proper manner and in the right perspective. Now, having the principles in mind we shall discuss the evidence, oral and documentary, under the various heads:

. . . .

9. (1) *Source of purchase-money:*—Exhibit B-1 is the sale deed dated 29th September, 1958 executed by Mohamed Mustaffa, the vendor, examined herein as P.W. 1 in favour of the defendant, who, according to the plaintiff, is only an ostensible vendee. This Exhibit B-1 recites that the total consideration Rs. 20,000 has been paid by the defendant himself, Exhibit A-21, the entry at page 81 of the ledger for the year 1133 M.E. (Avani) to 1135-Panguni, stands in the name of defendant. The vendor Mohamed Mustaffa has been examined as P.W. 1 on behalf of the plaintiff. He was examined on commission on 7th September, 1969 first and then on 23rd October, 1969 and subsequently on various other dates. While he was examined on 7th September, 1969 in the chief examination he would state that he and the plaintiff entered into an agreement Exhibit A-1 dated 16th September, 1957, by which P.W. 1 agreed to sell the property for Rs. 62,500 and he received an advance of Rs. 1,801. In Exhibit A-1 it is stipulated that the plaintiff should pay the entire amount within six months from the date of the agreement and obtain receipts then and there and should register the sale deed within the stipulated time. It may be noted that this document Exhibit A-1 is signed only by Mohamed Mustaffa and not by the plaintiff. According to P.W.1's evidence, on 7th September, 1969, he received Rs. 30,000 after the date of the agreement and he executed Exhibit B-1 in favour of the defendant as required by the plaintiff. Subsequently, the sale consideration was reduced from Rs. 62,500 to Rs. 30,000 which he received. At this stage, P.W. 1 wanted to look into the accounts and so the case was adjourned to 23rd October, 1969. On 23rd October, 1969 when his chief examination was continued with reference to the documents, he would state that the entry dated 29th September, 1958 for Rs. 2,000 in Exhibit A-19, the day book, refers to the amount mentioned in the sale deed. In Exhibit A-21, which is the entry at page 81 of the ledger, there is a debit entry in the name of the defendant for Rs. 2,000. But there is no corresponding entry in the day book for that amount. Then on the same date of 23rd October, 1969 since the witness was not supporting the case of the plaintiff, the plaintiff's counsel sought the permission of the Court to treat the witness as hostile and the permission was granted. We are not able to understand under what provision of the Evidence Act the permission was granted to treat the witness as hostile, and allowing the plaintiff's counsel to cross-examine him. There was no previous statement of the witness from which he had resiled so as to grant such permission.

. . . .

10. Then, while he was cross-examined on 7th December, 1969 by the plaintiff's counsel, he would state that the moneys received from the defendant were credited in his account and to a suggestion put by the learned counsel, he would state that "It is not correct to say that Rs. 2,000 credited to the defendant's account on the date of sale was received from the plaintiff, but it was received only from the defendant". In the course of the cross-examination by the defendant's counsel, his evidence is that he knew the plaintiff for the last 25 years and that there were no money transactions between him and the plaintiff and those transactions were entered in his account. On 22nd June, 1134 M.E., the plaintiff had borrowed Rs. 2,000 from him and he has returned the same. According to him, he has written letters to the defendant, demanding the sale consideration subsequent to the execution of the sale deed in his favour. He had also issued receipts for the amounts received. Exhibit B-4 dated 7th December, 1958 for Rs. 3,000, Exhibit B-5 dated 22nd January, 1959 for 2,000 and Exhibit B-6 dated 9th March, 1959 for Rs. 7,000 are all receipts for the said amounts received by him from the defendant to-

wards the sale consideration. Exhibit B-7 is the last receipt issued by him to the defendant in full settlement of the amount. Further, he would swear that as per the recital in Exhibit B-1 he had also been asking the defendant orally and through letters, to make the payments and that he is aware of the fact that the defendant had sold portions of the property purchased from him, to various other persons. Speaking about his accounts, he admits that he had not produced the accounts before the Income-tax authorities. But, he has produced some other accounts before those authorities and the accounts so produced do not contain anything about the plaintiff transaction and he would admit that he has not produced those accounts into the Court now. It is admitted by P.W. 1 that he gave possession of the property under Exhibit B-1 to the defendant and that he (P.W. 1) was in possession of the property till then and that there is no connection between the agreement Exhibit A-1 and the sale deed Exhibit B-1. Therefore, P.W. 1 himself has given a go-bye to the case of the plaintiff that the sale consideration was paid by him. But, on the other hand, he himself admits that he received the sale consideration as per Exhibits B-4 to B-7 only from the defendant.

11. The plaintiff, examining himself as P.W. 3, in the case, would reiterate his plaint allegations and state that he was the village officer during the period when Exhibits A-1 and B-2 came into existence and he retired from service only on 5th December, 1967, that as he was a Government servant he purchased the properties in the name of the defendant benami, and that the defendant executed a sale deed in his favour in respect of 25 acres of land. When cross-examined as to the source of income for purchase of these lands, he states that he had one acre of his Tamarind tope as his family property. He purchased a property in 1120 M.E. and sold it in the year 1953 for Rs. 17,000 and that he gave this amount as loan for interest and thus it accumulated in 1958 to Rs. 25,000. He admits that there is no promissory note or any other account relating to them and according to him, these money-lending transactions were only oral. Up till 1960 there was no bank account in his name. Further, he states that he got Rs. 15,000 about four months prior to the transaction from various persons and Rs. 45,000 from one Peer Kannu, Muthiah, P. Muthian, P. Sinian and K. Ponmuthu. But, none of these persons has been examined in this case. No receipt has been produced by him for the alleged payments to Mustaffa. So the evidence given by P.W. 3 is not at all acceptable to hold that he gave the money to P.W. 1. D.W. 9 is the defendant. He states that the plaintiff was only a broker and he gave 25 acres of land under Exhibit B-13 to the plaintiff, which the plaintiff sold for an exorbitant price of Rs. One lakh in the year 1968 under Exhibit B-15. According to him, he has got properties both in Kaliel and Arumanai, beside cash. On the other hand, P.W. 3 himself admits in his evidence that he was receiving a salary of Rs. 24 per month in 1118 M.E., and that it was subsequently revised to Rs. 125 per month. The entries in the ledger and the day book are marked as Exhibits A-2 to A-44. Exhibit A-2 is in the plaintiff's name and Exhibit A-21 is in the name of the defendant. The entries Exhibits A-5, A-6, A-9 to A-12, A-14 to A-18, A-20, A-23 to A-27, A-29, A-32 A-33, A-43 and A-44 are in the name of the plaintiff. The entries Exhibits A-17 and A-32 standing in the name of the plaintiff would show that the amounts noted therein were received through one Nannan who is none other than the defendant. Exhibits A-38, A-39, A-41 and A-42 are in the name of the defendant. The amounts received under Exhibits A-39 and A-41 were through one Swamikkan. Exhibits A-37 and A-40 are entries showing the receipt of the amounts through one Wilson, to whom the defendant had sold some properties. Since, as I have already mentioned, there were separate money transactions between P.W. 1 and the plaintiff, it cannot be conclusively held that the ledger and the day book marked in this case relate to the transaction under Exhibit B-1. The ledger has two separate folios for the transactions of both the parties, which would show that P.W. 1 was having transactions with both the plaintiff and the defendant separately. We also scrutinised carefully the entries in Exhibit A-19 the day book. All the en-

tries appear as though they are made by the same hand. As pointed out above, on 7th September, 1969 P.W. 1 has not produced the account and after the case was adjourned and he, was further examined in continuation of the chief examination on 23rd October, 1969 P.W. 1 has produced the accounts. This creates a suspicion that these accounts could have been prepared by him during the interval. This suspicion is strengthened by his admission in the cross-examination by the defendant's counsel, that he has not produced the accounts to the Income-tax authorities. So, we are of opinion that the accounts produced by P.W. 1 in support of the case of the plaintiff, are only self-serving evidence. The evidence of P.W. 2 also does not support the case to any extent on this aspect. From the foregoing discussions, we hold that the purchase-money was paid by the defendant and not by the plaintiff.

12. (2) *Possession of Property* :—P.W. 1 the original owner of the property, has stated, as mentioned supra, that till the date of registration of Exhibit B-1 he was in possession of the property and that he handed over the same to the defendant. The recital in Exhibit B-1 also would show that from the date of the execution of the document the said Mustaffa, the vendor, had handed over absolute possession of the properties to the defendant, the vendee. The plaintiff himself has admitted that the patta has been transferred only in the name of the defendant but he would add that he paid the kist. It has been admitted by P.W. 3 that the patta in respect of the lands purchased by him under Exhibit B-13 dated 29th September, 1958 *i.e.*, on the date of Exhibit B-1 itself has been transferred in his name and that he paid the kist for the same till he sold the properties to another. If really P.W. 3, the plaintiff had paid the entire sale consideration under Exhibit B-1 and paid the kist, nothing would have prevented him from getting the sale executed in his favour especially when he had purchased 25 acres of land on the same date from the defendant, the alleged benamidar. Exhibits B-27 to B-39 are the revenue tax receipts standing in the name of the defendant. The explanation given by P.W. 3 that he paid the kist, but handed over the kist receipts to the defendant, is ridiculous. Exhibit B-26 dated 18th March, 1959 is the licence issued by the Rubber Board to the defendant. After the purchase of the properties, the defendant had also sold various portions of the properties to D.Ws. 1,3, 4,5, 6, 7 and 8 and one Rev. Father Efram O.C.C. under Exhibits B-14, B-19, B-21 to B-25 and B-15 respectively. The plaintiff has not made any objection in respect of the sales made by the defendant to those persons. The suit notice in this case under Exhibit A-50 was given only on 16th January, 1968 to which the defendant sent a reply notice under Exhibit A-51 on 30th January, 1968. Therefore from the date of Exhibit B-1 upto the suit notice Exhibit A-50 in 1968, *i.e.*, for nearly a decade, the plaintiff has not taken any action to get the properties from the defendant. The cumulative effect of all these circumstances would unequivocally prove that the defendant has been and is in possession of the property, enjoying the same from the date of Exhibit B-1.

13. (3) *Position of the parties and their relation with one another*:—Admittedly the parties are not related. P.W. 3 the plaintiff, would state in his chief-examination that he was having confidence in the defendant and so he purchased the suit properties in the name of the defendant since the plaintiff was a Government Servant. Apart from that, there is no satisfactory evidence to prove any other relationship between the plaintiff and the defendant, so as to appreciate the case o the plaintiff that because of confidence in the defendant he got the sale deed in the name of the defendant.

14. (4) *Circumstances pecuniary or otherwise, of the alleged transfer and,* (5) *the motive for the transaction* :—The suit properties are of an extent of 40 acres 20 cents, comprised S. No. 1398/65-A in Kaliel Village. The entire area of the suit survey number is 250 acres, which originally belonged to one Seethankan and others. P.W. 1 purchased these properties under Exhibit B-3 dated 16th July, 1106 M.E., from the original owners. P.W. 1 executed an agreement for the sale of the properties on 16th September,

1957 under Exhibit A-1, with a condition that the sale must be completed within a period of six months. It cannot be disputed that the plaintiff did not purchase the said properties within the said period of six months. Then only Exhibit B-1 came into existence. As I have already discussed above under the heading "source of purchase-money" there is no satisfactory and reliable evidence to show that the plaintiff was having sufficient income to purchase the properties. The plaintiff relies only on his *ipse dixit* which is nothing but a self-serving piece of evidence, on which no Court could place any reliance. P.W. 3 would explain his not having purchased the properties in his own name, by saying that he was a village officer, *i.e.*, a Government servant and retired from service only on 5th December, 1967. From the above answer, he wants the Court to believe that he being a Government servant was prevented from purchasing properties without obtaining the permission of the Government. However, it is admitted by him that on the very same date of the execution of Exhibit B-1 he has purchased 25 acres of land in the same survey number from the defendant under Exhibit B-13. He has also purchased properties in the name of his wife and children. Then, he sold the properties for an exorbitant price. In the cross-examination he admits that he did not get any permission from the Government for the purchase of 27-90 acres of land while he was in service. Exhibit A-1 dated 16th September, 1957 has been executed while he was in service. He, being a village officer, would have been definitely thorough with the procedure adopted by Government servants while purchasing properties, the mode of transfer of pattas, payment of kist etc. If really the plaintiff had paid the amount for the purchase of the properties, he would have definitely got some receipts or some agreement from the defendant, to secure his rights. Thus, the evidence on each and every aspect belies his case that the property was purchased in the name of the defendant benami.

15. In order to determine the benami nature of a transaction, reliance must not only be placed on the surrounding circumstances and the position of the parties and their relations to one another, but also on the motive which governs their actions and subsequent conduct. In fact, the absence of motive does not decisively negative the benami nature; but it plays an important role. The motive alleged by the plaintiff *viz.*, that he being a Government servant, it was not open to him to purchase properties in his name and therefore he got them in the name of the defendant, is not quite satisfactory. Whatever may be the reasonableness of the motive alleged by the plaintiff, it is belied by the very conduct of the plaintiff in purchasing 25 acres of land from the defendant himself under Exhibit B-13 on the same day as Exhibit B-1. P.W. 3 alleges motive for the defendant to refuse to retransfer the properties in his name, stating that he gave the properties to the defendant on lease for some time and then he took possession of the properties, and that, due to this disputes arose between them and the defendant is creating trouble and then only he came to know the mind of the defendant. No lease deed, adangal extract or any other scrap of paper has been produced by the plaintiff to evidence that the defendant had taken the properties on lease from the plaintiff. The plaintiff has not examined any other witness to speak that the defendant had taken properies on lease from him.

(6) *Custody and production of title deeds* :—The defendant has produced Exhibit B-1 and the prior documents, Exhibit B-2 patta and Exhibit B-3 the sale deed in the name of P.W. 1. The patta also stands transferred in the name of the defendant. The important point to be noted is that in benami transactions, the real beneficiary would be in possession of the title deeds. The plaintiff has merely alleged that he asked the defendant to execute a resale of the properties in his name. It is highly improbable that a village officer would have permitted the defendant, the alleged benamidar, to keep the sale deed with him, if really the plaintiff was the real purchaser.

16. (7) *Previous and subsequent conduct of parties* :—As already mentioned, the suit sale deed Exhibit B-1 was executed in the year 1958. The suit notice was issued in the year 1968, after a de-

cade. Even when the defendant sold the properties to various persons, the plaintiff had not raised any objection. Even on the very same date of Exhibit B-1, the plaintiff himself has purchased 25 acres of land from the defendant. The kist receipts also stand in the name of the defendant. The explanation of P. W. 3 that he paid the kist amounts and handed over the kist receipts to the defendant, is rather ridiculous. If a person pays the kist amount on behalf of another, the kist receipts would clearly show that fact. In this case, when the kist receipts stand only in the name of the defendant, the explanation given by the plaintiff is not acceptable.

The explanation that he paid the kist amounts and handed over the kist receipts to the defendant, is too big a pill to swallow. The defendant has also obtained a licence under Exhibit B-26 from the Rubber Board even in the year 1959. Thus, the previous conduct of the parties also supports the case of the defendant and belies the case of the plaintiff.

17. Thus, viewing the case from each and every angle, there is not even an iota of evidence to support the claim of the plaintiff. On an overall appreciation of the entire evidence adduced by both parties, in the light of all relevant and surrounding circumstances, we have no hesitation to hold that the impugned sale deed Exhibit B-1 is not a benami transaction.

18. We accordingly confirm the findings of the lower Court and dismiss the appeal with costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

S. Krishna Nair and another .. *Petitioners**

v.

Rugmoni Ammal *alias* **Valiamma Pillai** .. *Respondent.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 40 (1) —Judgment of Division Bench relating to immovable property—Suit to set aside judgment—Parties not the same—Proper court-fee to be paid.

Where the plaintiffs effectively seek to set aside a judgment of the High Court relating to immovable property, it is obligatory that they should value the subject-matter of the suit as on the date when the fresh suit was filed by the parties who were not the same parties who agitated in the earlier proceedings and the suit has to be valued under section 40 (1) of the Tamil Nadu Court-fees Act giving the market value of the properties covered by the judgment of the High Court in the earlier suit as on the date of the plaint. [*Para.* 1.]

Cases referred to :—

Sengoda Nadar v. *Doraiswami Goundar*, (1970) 83 L.W. 728 : (1970) 2 M.L.J. 640: A.I.R. 1971 Mad. 380; *Kutumba Sastri* v. *Sundaraman*, I.L.R. (1939) Mad. 764 : (1939) 1 M.L.J. 702: A.I.R. 1939 Mad. 462.

Petition under section 115, Civil Procedure Code, praying the High Court to revise the order of the Court of the Subordinate Judge, Padmanabhapuram, dated 20th November, 1973 and made in Check Slip No. 85 in O. S. No. 13 of 1973.

V. Ganapathi Subramania Iyer, for *P. Ananthakrishnan Nair,* for Petitioners.

V. Manivannan, the Additional Government Pleader, for State.

*C.R.P. No. 70 of 1974. *26th August, 1975.*

The Court made the following

ORDER :—The lower Court has rightly appreciated the position. Having regard to the circumstances stated by it in an elucidatory order, the suit ought to have been valued under section 40 (1) of the Tamil Nadu Court-fees and Suits Valuation Act. This is a suit in which, effectively, the plaintiffs are seeking to set aside a judgment of a Division Bench of this Court passed in L.P.A. No. 68 of 1966 on 24th October, 1972. The question is whether the lower Court was right in having directed the plaintiffs to evaluate the property as on the date of the filing of the suit or should it have said that the market value should be on the basis of the value of the property as disclosed in the earlier proceedings. In the earlier proceedings, the first plaintiff was not a party. It was the second plaintiff who was conducting the litigation as purchaser of the property from the first plaintiff. This distinguishing feature has to be borne in mind. The plaintiffs, therefore, have come to Court though conjointly, to set aside, as I said effectively, the judgment of this Court which relates to immovable property. In these circumstances, it is obligatory that they should value the subject-matter of the suit as on the date when a fresh suit is filed by parties who are not the same parties who agitated in the earlier proceedings. For the reason that the parties to the present suit were not the parties in the earlier proceedings and also on the ground that the relief asked for in the present action is primarily for setting at naught the judgment of the Division Bench of this Court in the L. P. Appeal mentioned above, I am of the view that the suit has to be valued under section 40 (1) of the Court-fees Act. The next corollary is, as to what is the value to be adopted by the plaintiffs. The learned counsel for the plaintiff-petitioners would say that it is enough if the value as disclosed in the earlier proceedings is adopted in the present action. But, as I said, the distinguishing feature in this case, is,the plaintiffs in the present suit are not the same parties who participated in the earlier proceedings. This apart, I am inclined to follow the judgment of Sadasivam, J., in *Sengoda Nadar* v. *Doraiswami Gounder*[1], which in turn, referred to a full bench decision in *Kutumba Sastri* v. *Sundaraman*[2], and held that the suit has to to be valued by giving the market value of the properties covered by the judgment of this Court in the earlier suit as on the date of the plaint. The lower Court, therefore, was right in having come to the conclusion that, in the circumstances of the case, the property has to be valued under section 40 (1) and not under section 25 (*b*) and that it has to be evaluated as on the date of the plaint. There is no reason to interfere with the said conclusion. The civil revision petition is dismissed. There will be no order as to costs. The petitioners are granted two months' time to pay the Court-fee.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Krishnamurthi Iyer .. *Appellant**

v.

Sethurama Iyer and another .. *Respondents.*

Tamil Nadu Agriculturists Relief Act (VIII of 1973), *section* 23 (c)—*Execution—Property brought to sale on* 13*th February,* 1973—*Sale confirmed on* 21*st March,* 1973—*Application to set aside sale on* 30*th April,* 1973—*Application—Whether maintainable.*

Tamil Nadu Act VIII of 1973 came into effect on 24th January, 1973. The sale sought to be set aside took place on 13th February, 1973, in other words after the coming into effect of Tamil Nadu Act VIII of 1973. To such a case section 23 (*c*) of the Act cannot be applied at all in view of section 19. It is open to the judgment-debtor to seek scaling down of the decree if he satisfies the requirements of section 19.

Held, that the application under section 23 (*c*) by the judgment-debtor is not maintainable. [*Para.* 3.]

1. (1970) 2 M.L.J. 640 : (1970) 83 L.W. 728 : A.I.R. 1971 Mad. 380.
2. I.L.R. (1939) Mad. 764 : (1939) 1 M.L.J. 702 : A.I.R. 1939 Mad. 462.

* A.A.A.O. No. 12 of 1974.

5th September, 1975.

Case referred to :—

R. Dharmalingam v. *Nagalinga Kandiar*, (1975) 2 M.L.J. 34.

Appeal against the order of the Court of the Subordinate Judge, Thanjavur dated 22nd December, 1973 and made in C.M.A. No. 278 of 1973 E.A. No. 336 of 1973 in E.P.No. 291 of 1972 (O.S. No. 535 of 1969 of The District Munsif's Court, Mannargudi dated 30th April, 1973.)

M. Ramachandran, for Appellant.

K. Subramaniam and *G. Jagadisa Iyer*, for Respondents.

The Court made the following

ORDER :—The short facts relating to the civil miscellaneous second appeal are as follows. In execution of a decree in O.S.No. 535 of 1969 on the file of the District Munsif, Mannargudi the properties covered under this appeal were brought to sale on 13th February, 1973. The sale was confirmed on 21st March, 1973. An application under section 23 (*c*) of the Tamil Nadu Act VIII of 1973, was filed on 30th April, 1973 invoking the provisions of the said Act and seeking to set aide the sale. The executing Court held that the petition was not maintainable. However on appeal in C.M.A.No. 278 of 1973 the learned Subordinate Judge, Tanjore, set aside the order on the ground that the order of the executing Court was laconic. In his view, this was a case to which section 20 (*c*) would apply and on that reasoning the sale was set aside.

2. The learned counsel for the appellant Mr. M. Ramachandran, contends before me that the reasoning of the lower appellate Court is incorrect in law in view of the decision of N. S. Ramaswami, J., in *R. Dharmalingam* v. *Nagalinga Kandiar*[1], while the learned counsel for the respondent would submit that having regard to the 90 days time limit prescribed under the said section, the application was competent and therefore no exception could be taken to the order of the lower appellate Court.

3. I have absolutely no hesitation in holding that the judgment of the lower appellate Court is incorrect. Tamil Nadu Act VIII of 1973 came into effect on 24th January, 1973. This is a case in which the sale which is sought to be set aside took place on the 13th February, 1973, in other words after coming into effect of Tamil Nadu Act VIII of 1973. To such a case section 23 (*c*) cannot be applied at all since, there is section 19. It is open to the judgment-debtor to seek scaling down of the decree if he satisfied the requirements of the said section 19. I find the judgment of N. S. Ramaswami, J., is a clear authority on this point. Applying the said decision, I set aside the order of the lower appellate Court and hold that the application under section 23 (*c*) of the judgment-debtor is not maintainable. However, it is made clear that if he satisfies the requirements of either section 19 or 20 of the Act it is open to him to invoke the provisions of that sections.

4. This civil miscellaneous second appeal is allowed. No costs. No leave.

R.S. —— *Appeal allowed.*

1. (1975) 2 M.L.J. 34.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

Doraiswamy Gounder and another .. *Petitioners**

v.

Parayammal .. *Respondent.*

Evidence Act (*1 of* 1872), *section* 45—*Suit on promissory note—Endorsement showing payment—Genuineness of endorsement disputed—Application for sending promissory note to Government expert—Proper procedure to be followed.*

Unless it is not possible for the Government expert to examine the genuineness or otherwise of the endorsement on an original document without taking it from the custody of the Court, it would not be desirable to allow the document to be handled by him outside the Court. In the circumstances of the instant case it is desirable to have the endorsement examined by the Government expert, but he will do it in the presence of a Court

*C.R.P. No. 575 of 1974. 26*th August*, 1975.

official. If he feels it necessary he may be permitted to take photographic copies of the document. [*Para.* 7.]

Cases referred to :—

Narasimhan v. *Narayanan Chettiar,* (1968) 2 M.L.J. 48; *Ramaswami Konar* v. *Karuppa Konar,* (1971) 84 L.W. 348 ; *Nagarathinammal* v. *K. V. Rangaswamy Chettiar, and others,* (1973) T.N.L.J. 241.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Salem, dated 16th February, 1974 and made in I. A. No. 374 of 1974 in O. S. No. 2393 of 1972.

S. Palaniswamy, for Petitioner.

The Court made the following

ORDER :—This civil revision petition has been filed by the defendants in O. S. No. 2395 of 1972. The petitioners executed a promissory note in favour of the respondents. There is an endorsement in the promissory note on 10th March, 1971, showing payment of Rs. 10. This endorsement is impugned as not genuine and therefore the petitioners wanted the documents to be sent to a handwriting expert. The learned District Munsif relying on the decision in *Ramaswamy Konar* v. *Karuppa Konar*[1] dismissed the application.

2. Subsequently another application was filed for sending the promissory note to Government handwriting expert. This application was also dismissed on 16th February, 1974 on the ground that an earlier application had been dismissed and that the subsequent application was only a ruse to avoid trial. Hence this revision petition.

3. The learned counsel for the revision-petitioners submitted that the decision relied on by the learned District Munsif would only be applicable if the document is required to be sent to a private expert and if the document is to be examined by the Government handwriting expert, there could be no such bar. He placed before me the relevant decisions.

1. 84 L.W. 348.

4. In *Narasimhan* v. *Narayanan Chettiar*[1] Ramamurti, J., condemned the practice of sending the original documents in the custody of the Court to handwriting experts as being highly objectionable. It was pointed out by him that under no circumstances should a Court permit or allow the documents to go out of its custody, as such an evil practice is attendant with various risks, and that the proper procedure in such cases would be only to permit the handwriting expert to inspect the documents in the Court premises itself in the presence of some responsible officer of the Court and also if necessary to permit the expert to have photographic copies of the documents in the presence of the responsible officer of the Court. Any lapse in taking necessary safeguards in this direction, may, in his view, result in miscarriage of justice, besides creating complications. The learned Judge has also deprecated the practice of making belated and repeated applications for examination of documents by handwriting experts in order to protract and delay the trial.

5. This judgment was followed by Ramanujam, J. in *Ramaswamy Konar* v. *Karuppa Konar*[2], where an application was filed to send the promissory note to the finger-print expert at Vellore. The learned Judge held that the proper procedure in such cases would be only to allow the handwriting expert to inspect the documents in the Court premises itself in the presence of some responsible Court official and also, if necessary to permit the expert to have photographic copies of the same.

6. In *Nagarathinammal* v. *K. V. Rangaswamy Chettiar and others*[3], the same question came up for consideration before Raghavan, J. The learned Judge had to consider the prayer for sending the document to the State Forensic Science Lecturer for opinion. It was held that there was no harm in sending the original document to Government expert for opinion.

7. The question for consideration is whether the document could be parted with in favour of a finger-print expert,

1. (1968) 2 M.L.J. 48.
2. (1971) 84 L.W. 348.
3. (1973) T.N.L.J. 241 (C.R.P. No. 2137 of 1972).

whether a private or a Government one. The decisions of Ramamurti, J., and Ramanujam, J. which have been referred to are clear on the point that it is unsafe to part with the documents in the course of the trial. The learned Judges did not make any distinction between private and Government experts. It is true that Raghavan, J., has permitted the handing over of the documents to Government expert. I do not know the circumstances under which the learned Judge felt it possible to part with the document in favour of the Government expert. The consideration that weighs in not allowing the document to be handled by any other person is only for the purpose of ensuring the safety of the document or prevent its being tempered with. It will have to be considered if there will be no undue risk if the document is parted with in favour of a Government expert. As far as private experts are concerned, the decisions are uniform. As far as Government expert is concerned unless it is not possible for the expert to examine the genuineness or otherwise of the endorsements without taking it from the custody of the Court, it would not be desirable to allow the document to be handled by him outside the Court. I think that in the circumstances it is proper and desirable to have the endorsement examined by the Government expert, but he will do it in the presence of a Court official in the District Munsif's Court, Salem. If he feels it necessary, he may be permitted to take photographic copies of the document. Subject to the above, the civil revision petition is allowed. There will be no order as to costs.

R.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

The Velraveli Weavers' Co-operative Production and Sales Society Ltd., Velraveli Village, Erode Taluk by its President .. *Appellant**

v.

R. Perumal Naidu .. *Respondent.*

Limitation Act (XXXVI of 1963), section 14 —Time spent in prosecuting previous proceedings bona fide *—Exclusion.*

In a suit for reinstatement and arrears of pay upto the date of the suit and salary from the date of the suit till reinstatement, the termination of service was held to be illegal and reinstatement was ordered ; but the plaintiff was directed to file a fresh suit for future salary. In the second suit for arrears of future salary the plaintiff is entitled to the benefits of section 14 of the Limitation Act and no portion of his claim is barred by limitation because he was *bona fide* prosecuting his claim in a previous proceeding.

[*Paras.* 6 & 7.]

Cases referred to :—

Rabindra Nath. Samuel Dawson v. *Sivakami and others*, (1972) 2 S.C.J. 30: (1972) 2 M.L.J. (S.C.) 38 : (1972) 2 An.W.R. (S.C.) 38 : A.I.R. 1972 S.C. 730 ; *India Electric Works Ltd.* v. *A. James Mantosh and another*, (1971) 2 S.C.J. 117: A.I.R. 1971 S.C. 2313.

Appeal against the decree of the Court of the Subordinate Judge, (Principal) of Erode in Original Suit No. 249 o 1968.

N. Sivamani, N. Krishnamitra and *V. Narayanaswami*, for Appellant.

K. Sarvabhauman and *T. R. Mani*, for Respondent.

The Court delivered the following

JUDGMENT :—The defendant in O. S. No. 249 of 1968 on the file of the Court of

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* Appeal No. 32 of 1972. 18*th August*, 1975.

the Subordinate Judge of Erode is the appellant herein. The facts are not in controversy at all. The respondent herein was employed as a clerk in the appellant-society from 1951 and his appointment was made permanent in 1952. On 23rd January, 1957, he was served with a notice dated 7th January, 1957 terminating his service with effect from 12th December, 1956. Thereupon he instituted a suit against the appellant herein in O. S. No. 284 of 1957 on the file of the Court of the District Munsi of Erode for a declaration that his dismissal by the appellant-society was illegal, for a mandatory injunction directing the appellant-society to reinstate him in the old post as a clerk, for arrears of pay up to the date of suit with interest thereon and for future salary from the date of suit till reinstatement of the respondent and for other incidental reliefs. The trial Court passed a decree declaring that the dismissal of the respondent by the appellant was wrongful and directing the appellant to reinstate the respondent in his original job, giving liberty to the appellant to call for fresh explanation from the respondent and to hold an enquiry and directing the appellant to pay a sum of Rs. 134.84 being the arrears of pay from 12th December, 1956 to 1st January, 1957. The respondent preferred an appeal in A. S. No. 146 of 1962 on the file of the Court of the Subordinate Judge of Erode against that portion of the decree of the trial Court which refused to give him the relief of arrears of salary and against the direction given to the appellant for initiating proceedings once again. The appellant also preferred an appeal, A.S. No. 133 of 1961 on the file of the same Court. Both the appeals were tried together and a common judgment was pronounced on 24th November, 1962. The learned Subordinate Judge dismissed the appeal preferred by the appellant and allowed the appeal preferred by the respondent in part holding that the respondent was entitled to arrears of salary and setting aside that portion of the decree which directed a fresh enquiry. A second appeal, S.A. No. 177of 1963, on the file of this Court was preferred by the appellant against the judgment of the learned Subordinate Judge and that second appeal was allowed in part by this Court in 2nd January, 1967, a certified copy of the judgment therein having been marked as Exhibit A-3 in these proceedings. This Court, while upholding the finding of the Courts below that the dismissal was illegal, held that the respondent would have to file a separate suit for the salary due to him after the date of the plaint in the earlier suit, namely, O.S. No. 248 of 1957. This Court observed:

> "The result of holding that the dismissal of the plaintiff is invalid in law would be that he should be deemed to be in service all through and the result would also be that month after month, he would be entitled to his salary. If the salary is not paid as and when due, under Article 7 of the first Division of the Schedule to the Limitation Act, 1963, he would have a period of three years within which he could file a suit for arrears of the salary. A suit for a declaration that the dismissal of the plaintiff is invalid in law and for arrears of salary till the date of suit cannot be converted into a suit enabling him to recover arrears of salary due to him without any limit of time till he is restored to his old post."

It is thereafter the present suit was instituted by the respondent herein claiming salary for a period of 119 months at the rate of Rs. 110 per mensem, that is, for the period 1st April, 1957 to the end of February, 1967. The suit was resisted by the appellant herein. With regard to the period of limitation, by an amendment to the plaint, the respondent claimed that he was entitled to the benefit of section 14 of the Limitation Act. The appellant had filed two additional written statements, one of which related to this claim of the respondent to the benefit of section 14 of the Limitation Act.

On the pleadings of the parties, the following issues were framed for trial :

1. Whether the plaintiff is entitled to the decree ?

2. Whether the suit is not maintainable ?

3. Whether the suit is barred by limitation ?

4. Whether the plaintiff is entitled the arrears of salary ?

5. Whether there is cause of action for the suit ?

6. To what relief ?

7. Whether the plaintiff is entitled of exclude the period under section 14 of the Indian Limitation Act ?

8. Whether the suit is barred by *res-judicata.*

2. By judgment and decree dated 20th December, 1971, the learned Subordinate Judge of Erode held that during the period for which the respondent claimed salary, he was employed elsewhere and earned a sum of Rs. 2,663 and deducting that amount, for the balance he was entitled to a decree. Consequently the suit was decreed for a sum of Rs. 10,427 with subsequent interest. It is against this decree and judgment that the present appeal has been preferred by the defendant in the suit.

3. Though the issues detailed by me above were repetitive, the only question that really arose for consideration before the lower Court and which was argued before me in the appeal, having regard to the earlier proceedings, was, whether the respondent herein was entitled to claim salary for the entire period of 119 months, deducting the sum of Rs. 2,663 which he earned by employment eleswhere or he was entitled only to the salary for a period of three years immediately preceding the institution of the suit; in other words, whether the respondent herein was entitled to the benefit of section 14 of the Limitation Act, and if he was so entitled, whether any part of the claim made by the respondent was barred by limitation.

4. As I have pointed out already, the second appeal, S.A.No.177 of 1963, was disposed of on 2nd January, 1967 and the present plaint itself was presented on 7th March, 1967. Therefore, there was no question of any delay after the disposal of the second appeal and before the filing of the present suit. Mr. N. Sivamani, learned counsel for the appellant brought to my notice a decision of the Supreme Court in *Rabindra Nath Samuel Dawson* v. *Sivakami and others*[1], for contending that the respondent herein cannot claim the benefit of section 14 of the Limitation Act, because he could not be said to have *bona fide* prosecuted his claim for future salary in the earlier suit. Before I refer to this decision, I must make one point clear. I have already extracted a portion of the judgment of this Court in S.A.No. 177 of 1963 and that portion proceeds on the assumption that the plaint in the earlier suit, namely, O.S.No.284 of 1957 did not ask for a decree for payment of salary subsequent to the date of the plaint. That assumption is not correct and having regard to the pleadings in the earlier proceedings, both sides agree that the plaint in O.S.No.284 of 1957 did contain a prayer for a direction to the appellant herein to pay future salary to the respondent till the date of his reinstatement. Therefore, that portion of the observation of this Court in the judgment in S.A.No.177 of 1963 referred to above cannot be said to be accurate. It is against this background, I am considering the decision relied on by the learned counsel for the appellant.

5. In the decision referred to above, a suit was filed for a declaration that the orders setting aside certain revenue sales were without jurisdiction and void for non-conformity with section 50 of the Travancore Revenue Recovery Act and on certain other grounds. The defendants took up a preliminary objection to the effect that the suit was not maintainable without making the Government a party. That contention was negatived by the learned District Munsif. Against that decision, a revision petition was preferred to the High Court and when the matter came up for hearing before the High Court, the learned counsel for the plaintiff in that suit stated that the Government was not a necessary party to the suit, that the plaintiff was not prepared to implead the State as a party and that he was prepared to take the risk of not impleading the State as a party. On that representa-

1. (1972) 2 S.C.J. 30 : (1972) 2 M.L.J. (S.C.) 38 : (1972) 2 An.W.R. (S.C.) 38 : A.I.R. 1972 S.C. 730.

tion by the plaintiff that he was prepared to the take risk of not impleading the State as a party, the High Court dismissed the revision petition. After the case was remanded, the District Munsif tried the suit, passed a decree in favour of the plaintiff and that decree in the suit was confirmed by the District Court on appeal. However, when the matter was taken up in second appeal, a Full Bench of the Travancore-Cochin High Court held that the Government was a necessary party and that by reason of the failure of the plaintiff to implead the Government, the suit was not maintainable, with the result the second appeal was allowed and the suit was dismissed. Thereafter, the plaintiff issued a notice under section 80, Code of Civil Procedure, to the Government and filed a fresh suit. The question that came up for consideration was, whether for the purpose of filing the fresh suit, the plaintiff could claim benefit of section 14 of the Limitation Act. The High Court held that having regard to the facts stated above, the plaintiff therein could not be said to have prosecuted his earlier suit *bona fide* and therefore he could not get the benefit of section 14 of the Limitation Act. The High Court in that case observed:

> " From what we have stated above, it will be plain that the appellant took objection to the non-impleading of the Government as a party at the earliest possible opportunity. The respondents would not take note of that objection. They persisted in their attitude till ultimately the High Court of Travancore-Cochin held that the suit will have to fail for the non-impleading of the necessary party. A request was made to the High Court to permit the respondents herein to remedy the defect. The learned Judges held that they could not accede to that request and that the suit has to be dismissed 'as in spite of timely objection raised by the defendant on the ground of non-joinder of parties the plaintiff persisted in proceeding with the suit undertaking to bear the risk of not impleading the sircar'. This attitude on the part of the respondents is sufficient to dispose of the question of *bona fides* against them."

The Supreme Court, after extracting the above portion of the judgment observed:

> " The reasons given by the High Court are in our view cogent. Section 14 of the repealed Limitation Act which is applicable to this case gives benefit to a party who has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of first appeal against the defendant, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from the defect of jurisdiction or other cause of like nature is unable to entertain it. The appellant's advocate points out that under section 2 (7) nothing shall be deemed to be done in good faith which is not done with due care and attention and that in this case the appellant was *bona fide* in purchasing the suit properties from an auction-purchaser who also purchased them in revenue sales *bona fide* and that without notice to either of them, the sale has been set aside which is totally without jurisdiction and injuriously affects the appellant. That the appellant was caught in this predicament may be unfortunate but in so far as the question whether he *bona fide* prosecuted the earlier suit and appeal there could be no two opinions on the undisputed facts which have been clearly and forcefully stated by the High Court. It is clear that no suit for declaration and possession could have been filed against the defendants in respect of the revenue sales which was (sic) set aside without impleading the Government. The objection as to the maintainability of the suit was taken at the very initial stage but that was resisted and the appellant invited a decision by the District Munsif. Even at the stage of revision against that order in the High Court, he took the risk of proceeding with the suit. This was, therefore, not a case of prosecuting the previous proceedings *bona fide*."

I am of the opinion that the above decision of the Supreme Court can have no application whatever to the facts of the present case. In the present case, no

objection whatever was taken to the claim of the respondent for a decree for future salary till the date of reinstatement either before the trial Court or even before the first appellate Court, notwithstanding the fact that the respondent and the appellant each preferred appeals before the first appellate Court against the portions of the decree passed against them. The objection was taken only before this Court in S.A.No.177 of 1963 and that is admitted in the additional written statement filed in the present case. Therefore, unlike the case before the Supreme Court where the plaintiff expressed his determination not to implead the Government as a party and stated that he was prepared to take the risk of not impleading the Government as a party, in the present case, there was no such conduct on the part of the respondent herein; from which it could be said that the respondent was not *bona fide* prosecuting his claim for future salary from the date of plaint till the date of reinstatement.

6. On the other hand, another decision of the Supreme Court in *India Electric Works Ltd.* v. *James Mantosh and another*[1], would appear to be in favour of the respondent herein, with regard to the scope of section 14 of the Limitation Act. In that case, in a money suit for recovery of damages for illegal occupation, a decree had been passed by the trial Court in favour of plaintiff for the entire claim including the claim for future damages. The High Court in appeal negatived the claim for future damages on the ground that no decree could be granted for recovery of compensation after the date of the suit or after the date of the decree in a pure money suit. The plaintiff thereafter filed a suit for damages for the period subsequent to the period covered by the earlier suit. For the period beyond three years of the suit, protection from limitation was claimed under section 14 of the Limitation Act and on the general principles of suspension of limitation owing to the pendency of earlier suit. The Supreme Court held that the plaintiff therein was entitled to the benefit of section 14 of the Limitation Act. The claim in the present case is similar because the plaintiff claimed not only the arrears of salary with interest till the date of plaint, but also future salary from the date of plaint till the date of reinstatement. I have already held that the prosecution of that claim was *bona fide*.

7. Hence, the conclustion of the trial Court that the respondent herein was entitled to the benefit of section 14 of the Limitation Act and that therefore no portion of the claim was barred by limitation is correct.

8. No other point was urged before me.

9. Under these circumstances, the appeal fails and is dismissed. There will be no order as to costs.

R. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M.M. Ismail, J.*

The Commissioner for Hindu Religious and Charitable Endowments Madras .. *Appellant**

v.

The Maligai and Shop Varthagar Sangam, Shevapet, Salem 2, by its Secretary A. Peran Chetty and others .. *Respondents.*

(A) *Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 6—Hereditary trustee—Definition of.*

(B) *Temple—Dilapidated—Renovation by Sangam and providing permanent source of income—Whether Sangam is hereditary trustee.*

The definition of the term "hereditary trustee" contained in section 6 (11) of the Madras Hindu Religious and Charitable Endowments Act, 1959 contemplates three possibilities : The first, is, the succession to the office of the trusteeship must devolve by hereditary right; the second is, the succession to the office of trusteeship must be regulated by usage;

1. (1971) 2 S.C.J. 117 : A.I.R. 1971 S.C. 2313.

* Appeal No. 141 of 1971. 31*st July*, 1975.

and the third is, the succession to the office of trusteeship must be specifically provided for by the founder. The common feature to all these three situations is that there is a succession to the office of trusteeship. "Usage" can have relevancy, meaning and significance only if a particular method of succession has been proved to be in existence over a long period during which more than one succession had taken place. [*Para.* 2.]

Appeal against the decree of the Court of the Subordinate Judge (Additional) at Salem in Original Suit No. 24 of 1963.

The Government Pleader, for Appellant.

K. Parasaram, P. Narasimhan and *P. Jayaraman*, for Respondents.

The Court delivered the following

JUDGMENT.—The third defendant in O.S.No. 24 of 1963 on the file of the Court of the Subordinate Judge of Salem is the appellant herein and the appeal lies in a very narrow compass even though much judicial time has been spent on matters which are not strictly relevant for the resolution of the controversy raised before the trial Court. The facts which are admitted or established by the evidence and which are not disputed before me are as follows: From time immemorial there had been a temple for Sri Gana Dhandayuthapaniswamy situated in the hillock called Kariaperumal Karadu, situated in Nethiedu, a suburb of Salem. The temple became a dilapidated one and its renovation was done about 50 years back by the brother of P.W.1, one Nagappa Chettiar. From 1924 onwarsds there had been a sangam called The Maligai and Shop Varthagar Sangam, Shevapet. The said Nagappa Chettiar, was the moving spirit behind this Sangam. For the purpsoe of renovating the temple in question, he spent considerable moneys of his own and he also collected donations from others. In addition to renovating the temple, a site was purchased from the Municipality whereon buildings were constructed for the purpose of deriving income for the maintenance of the temple. The Sangam which was an unregistered body came to be registered under the Societies Registration Act, in 1957. When the Area Committee functioning under the Hindu Religious and Charitable Endowments Act, 1951, took steps for appointment of non-hereditary trustees for the temple in question, the Sangam filed an application, namely O.A.No.125 of 1958, before the Deputy Commissioner, Hindu Religious and Charitable Endowments to set aside the appointment of the Area Committee and for declaring it as hereditary trustees of the temple in question. That petition was dismissed and the appeal preferred by the Sangam against that order was also dismissed, and thereafter the present suit was instituted under section 70 of the Hindu Religious and Charitable Endowments Act, 1959 for setting aside the order of the Commissioner confirming the order of the Deputy Commissioner, and for declaring the first respondent as hereditary trustee of the temple.

2. The suit was resisted by the appellant herein as well as the non-hereditary trustee appointed for the temple by the authorities functioning under the Act. Though several questions as to who effected renovation, whether the first respondent Sangam was functioning throughout at all and whether it managed the temple have been considered, I am of opinion that a finding on all these question is not strictly relevant for the disposal of the appeal in view of the statutory definition of the term 'hereditary trustee'. Section 8 (11) of the Hindu Religious and Charitable Endowments Act, 1959, defines the expression 'hereditary trustee' as meaning:

> " a trustee of a religious institution, the succession to whose office devolves by hereditary right or is regulated by usage or is specifically provided for by the founder, so long as such scheme of succession is in force."

The term 'trustee' has been defined in section 6 (22) of the same Act as meaning :

> "any person or body by whatever designation known in whom or in which the administration of a religious institution is vested, and includes any person or body who or which is liable as if such person or body were a trustee."

It is in the light of these definitions, the question has to be considered whether the

first respondent herein can be said to be a hereditary trustee of the temple in question. For the purpose of deciding this controversy, I am assuming that the first respondent herein renovated the temple and was in management of the temple. As a matter of fact, the learned Subordinate Judge in paragraph 17 of the judgment states that the Sangam had been managing the suit temple for the past about 33 years prior to the suit. In fact, this statement of the learned trial Judge cannot be strictly correct. As I pointed out already, the Sangam was registered under the Societies Registration Act, in the year 1957, even though the unregistered body might have been in management prior to that date. Notwithstanding this assumption, still the question is whether the first respondent Sangam can be said to be a hereditary trustee within the statutory definition. I am clearly of the opinion that it cannot be called a hereditary trustee. From the definition of the term 'hereditary trustee' contained in section 6 (11) of the Act, it is clear that three possibilities are contemplated. The first is, the succession to the office of the trusteeship must devolve by hereditary right; the second is, the succession to the office of trusteeship must be regulated by usage; and the third is, the succession to the office of trusteeship must be specifically provided for by the founder. The common feature to all these three situations is that there is a succession to the office of trusteeship. As far as the present case is concerned, from the very nature of the case the first respondent could not claim that the succession to the office of trusteeship devolved on it by hereditary right. Equally, since the temple was an ancient temple and it is not known who founded the temple, and all that the first respondent could claim was that it renovated the temple, the third contingency contemplated also does not arise in the present case because there is nothing to show that succession to the office of trusteeship was specifically provided for by the founder. Therefore, if at all, the first respondent could claim to come within the scope of the second contingency enumerated by me already, namely, the succession to the office of trusteeship is regulated by usage. In this case, there is absolutely no evidence as to who was the trustee before the Sangam took over the renovation work and therefore the first respondent Sangam itself is not in a position to say that it succeeded to the office of the trusteeship by a particular method or manner. As far as the Sangam itself is concerned, it is still in existence and it is in management of the trust property and therefore there is no question yet of the succession to the office of trusteeship being regulated by usage. The "usage" can have relevancy, meaning and significance only if a particular method of succession has been proved to be in existence over a long period during which more than one succession had been taken place. In this case, as I pointed out already, all that has been established is that the first respondent Sangam, before its registration, having renovated the temple, continues to be in management of the temple even after the registration. From this alone it is not possible to hold that the succession to the office of trusteeship is regulated by usage, and by such usage the first respondent Sangam has become the trustee and therefore it is the hereditary trustee of the temple in question. In view of this conclusion of mine it is immaterial whether the first respondent was a registered body or an individual because the definition of the term 'trustee' also included a body of persons, but so far as the present case is concerned, even on the basis that a body can be hereditary trustee, still the crucial requirement, namely that the succession to the office of the trusteeship must be regulated by usage, has not been established in the present case. In view of this the first respondent Sangam cannot be said to be a hereditary trustee of the suit temple within the meaning of that expression occurring in section 8 (11) of the Act, and consequently the first respondent was not entitled to the declaration it prayed for. Unfortunately, the learned Subordinate Judge has not borne this aspect in mind. In paragraph 17 of his judgment he has considered this question and appears to have proceeded merely on the basis of equitable considerations without reference to the statutory provisions themselves. In that paragraph, the learned trial Judge extracted the definition of the term 'hereditary trustee' occurring in section 6 (11) of the Act and also stated that it could not be said that the

office of trusteeship devolves by hereditary right in this case and that the founder of the suit temple was not known and so there was no provision by any founder for succession to the office of trusteeship. Notwithstanding this conclusion, he proceeded to state :

"But it can be said that in the present case, the right to the office of trusteeship is regulated by usage, because for a very long period of 33 years the plaintiff Sangam through its Office-bearers has been managing the affairs of the suit temple. As mentioned earlier when the suit temple was in a ruined condition, uncared for by anybody, the plaintiff, Sangam had taken the pains of renovating it and had provided a permanent source of income for the upkeep of the suit temple by purchasing a site and bv constructing buildings thereon and utilising the rental income therefrom for that purpose. There is no evidence on record to show if the suit temple has any other source of income excepting, the buildings put upon through the efforts of the plaintiff Sangam, in the site purchased from the Municipality. Even the third parties who had provided some buildings in that site purchased from the Municipality had left them with the plaintiff Sangam to utilise the income therefrom for the upkeep of the suit temple which is evidenced by Exhibits A-134 and A-135. Therefore it is just and equitable that the plaintiff Sangam should be recognised, as the hereditary trustee of the suit temple, in the interest of the suit temple."

Thus it is clear that the learned trial Judge proceeded merely on the basis of equitable consideration, but I am of the opinion that such consideration are foreign to the scope of the suit because it is a statutory one instituted under section 70 of the Act XXII of 1959 for the purpose of setting aside the order dated 7th September, 1962, in Hindu Religious and Charitable Endowments. Appeal No. 6 of 1962 passed by the trial Judge exercising the powers of the Commissioner and for declaring the Sangam as the "hereditary trustee" of Sri Gnana Dhandayuthapani Temple" within the scope of the expression contained in the Act itself. In these circumstances the conclusion of the trial Court cannot be sustained and the appeal is therefore allowed and the judgment and decree of the learned subordinate Judge are set aside and the suit instituted by the first respondent will stand dismissed.

3. Having regard to the fact that the first respondent Sangam had taken the pains of renovating the temple and had provided a permanent source of income for the upkeep of the suit temple by purchasing a site and by constructing buildings thereon and managing the temple without any complaint, I think this is a fit and proper case in which I should direct the parties to bear their respective costs both in this Court as well as in the trial Court.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M.M. Ismail, J.*

M. Sundaresan Chettiar .. *Appellant**

v.

A. Muthuvelavendan Nadar .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), section 3 (11) proviso (A)—Agriculturist—Person having saleable interest in agriculturist land—Burden of proof.

It has been settled by the Privy Council as well as by this Court that the burden of proving that a person who has a saleable interest in agricultural land comes within the scope of one or the other of the provisos to section 3 (11) of Madras Act IV of 1938 is on the creditor. [*Para.* 1.]

Cases referred to :—

Veerayya v. *Sivagami Achi*, (1949) 2 M.L.J. 688: 62 L.W. 819 : A.I.R. 1949 P.C.

* Appeal No. 402 of 1970. *5th March*, 1975.

319; *Periasami Pillai* v. *Sivathia Pillai*, (1940) 2 M.L.J. 498: A.I.R. 1941 Mad. 112; *Suryanarayanamurti* v. *Satyanarayanamurthi*, (1946) 1M.L.J. 54: 59 L.W. 36: A.I.R. 1946 Mad. 264.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No.299 of 1968.

S. Nainarsundaram and *V. Natarajan*, for Appellant.

M. Chinnappan Nair and *S. Ramalingam*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 299 of 1968 on the file of the Court of the Subordinate Judge of Coimbatore is the appellant herein. The appellant instituted the suit against the defendant for recovery of the sum due under Exhibit A-1 promissory note, dated 17th April, 1964 for Rs. 10,000 executed by the respondent in favour of the appellant. The suit was decreed as prayed for with costs, but with interest as per the Madras Act IV of 1938. In the appeal the only question that is raised is whether the respondent was entitled to the benefits of the Madras Act IV of 1938. This question has been dealt with by the learned Subordinate Judge in paragraph 10 of his judgment under additional issue. This question was raised by the respondent by way of an additional written statement filed by him. The learned counsel for the appellant relies on an affidavit filed by the respondent herein on 26th August, 1969 wherein he stated that he had been given notice of assessment in which the income from his wife's property was included and that he had appealed against the same and he was likely to succeed. The learned counsel for the appellant contends that in the light of this admission of the respondent he was not an agriculturist within the meaning of the Madras Act IV of 1938 and he was not entitled to the benefits of the Act. I am unable to accept his argument. The defenition of the term " agriculturist " is to be found in section 3 (11) of the Act: Under section 3 (11) (*a*) a person having a saleable interest in any agricultural or horticultural land in this State will be an agriculturist. It is not disputed in this case that the respondent had a saleable interest in agricultural land in the State. However, the question is whether the respondent falls within the scope of proviso (*d*) to section 3 (11) of the Act and therefore he was not entitled to the benefits of the Act. Proviso (a) states that a person shall not be deemed to be an agriculturist if he had been assessed to income-tax under the Income-tax Act for certain periods. For the purpose of the rate of interest, what is relevant is the actual proviso to section 13 of the Act. According to that proviso the person should have been assessed to income-tax under the Indian Income-tax Act for both the financial years ending with 31st March, immediately preceding the date on which the debt is incurred. In this case, the date of the promissory note is 17th April, 1964 and therefore unless it is established that the respondent was assessed to income-tax for both the financial years ending on 31st March, 1964, the proviso (a) will not apply to the respondent's case. In this context it is necessary to refer to what the respondent stated in his affidavit referred to already. In paragraph 3 thereof he stated, "I have not been assessed to any income-tax after 1961. This year I have been given notice of assessment in which the income from my wife's property is included. I have appealed against the same and I am likely to succeed." Thus, the above averment in paragraph 3 of the affidavit of the respondent would not bring the case within the scope of the proviso to section 3 (11) of the Act. It is not disputed that there is no other evidence to show that the respondent came within one or other of the provisos to section 3 (11). It has been settled by the Privy Council as well as by this Court that the burden or proving that a person who has a saleable interest in agricultural land comes within the scope of one or the other of the provisos is on the creditor. The Privy Council in *Veerayya* v. *Sivagami Achi*[1], stated as follows:

" Some discussion took place before the Board as to the burden of proof, and the Judges of the High Court seem to have considered that the burden of

1. (1949) 2 M.L.J. 688 : 62 L.W. 819 : A.I.R. 1949 P.C. 319.

proving that they were agriculturists entitled to relief under the Act lay upon the appellants. In the first instance no doubt the burden was upon the appellants to show that they were agriculturists. But having shown that they fell within the general definition of that term they would be entitled to relief unless they were deprived of the privilege by one of the provisos and the burden would lie upon any one so asserting to prove his case."

The same view was taken by the Court in an earlier judgment *viz.*, *Periasami Pillai* v. *Sivathia Pillai*[1]. The Bench of this Court stated as follows :

"With reference to the question of the burden of proof under section 3 (11) of Madras Act IV of 1938 and its provisos, it seems to us clear that the applicant has first to establish a *prima facie* case that he falls under one of the categories enumerated in section 3 (11) (*a*) to (*d*). Then the burden shifts to the respondent to show *prima facie* that the applicant is excluded by one or other of the provisos. When this has been done the burden again shifts to the applicant to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos."

The same view was reiterated in another judgment of this Court in *Suryanarayanamurthi* v. *Satyanarayanamurthi*[2]. This Court again pointed out as follows :

"It has been held by this Court that when once a person is shown to have a saleable interest in any agricultural land the burden of proving that he is disqualified under one or other of the four provisos to section 3 (11) lies upon the creditor. Here, the debtors would undoubtedly be agriculturists unless they come within the mischief of one or other of the provisos, because the mortgage in question includes agricultural land. The burden, therefore, of showing that the debtors were disqualified from claiming the benefits of the Act lay upon the creditors......"

1. (1940) 2 M.L.J. 498 : A.I.R. 1941 Mad. 112.

2. (1946) 1 M.L.J. 54 : 59 L.W. 36 : A.I.R. 1946 Mad. 264.

2. Under these circumstances, it is clear that the appellant had not discharged his burden and it has not been established that the respondent is not entitled to the benefits of the Madras Act IV of 1938. Consequently the appeal fails and it is dismissed with costs.

R.S. ———*Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

V.R.S.RM. Ramaswami Chettiar and another .. *Appellant**

v.

Sri Devi Talkies by partner K. Ramakrishnan and others .. *Respondents.*

Negotiable Instruments Act (XXVI of 1881), section 118—Presumption as to passing of consideration—Burden of proof.

Until the contrary is proved, every negotiable instrument which is duly made or deemed to have been made should *prima facie* be held to be one supported by consideration. Presumption under section 118 of the Negotiable Instruments Act, shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant, the defendant may adduce direct evidence to prove that the promissory note was not supported by consideration and if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. It is therefore clear that the burden is ambulatory; at one time it is on the plaintiff, and according to the proof and circumstances, it shifts on to the shoulders of the defendant. [*Para.* 18.]

Case referred to :—

Narasamma v. *Veeraraju*, I.L.R. 58 Mad. 841: A.I.R. 1935 Mad. 769.

Appeals against the decrees of the Court of the Subordinate Judge (Principal)

* Appeal Nos. 260 and 533 of 1971. *27th February, 1975.*

dated the 29th day of March, 1971 and passed in O.S. No. 290 of 1970 (in Appeal No. 260 of 1971) and in O.S. No. 299 of 1970 (in Appeal No. 533 of 1971) respectively.

N.C. Raghavachari and *N.S. Varadachari*, for Appellant.

V. Shanmugham, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—These two appeals arise out of two original suits, O.S. Nos. 290 and 299 of 1970, on the file of the Court of the Subordinate Judge of Madurai. They are connected in the sense that the plaintiff in one suit (O.S. No. 290 of 1970) is the husband of the plaintiff in the other (O.S. No. 299 of 1970) and the defendants are common. For the purpose of convenience, we shall take up Appeal No. 260 of 1971 which is against the judgment and decree in O.S. No. 290 of 1970. The plaintiff's case that defendant's 2 and 3, partners of the first defendant, Sri Devi Talkies, borrowed a sum of Rs. 55,000 on 26th February, 1970 gave a bearer cheque on the Thanjavur Permanent Bank limited for the said amount, undertook to repay the amount within a few days thereafter and gave an assurance to the plaintiff that the cheque (Exhibit A-1) given by them could be presented for encashment after seventeen days. In furtherance of the assurance, as also in evidence of the borrowing, the defendants executed a letter Exhibit A-3, which also bears the same date as the bearer cheque. Under Exhibit A-3 the defendants unconditionally acknowledged that they had discounted the cheque for Rs. 55,000 for cash received, less discounting commission of Rs. 421.50. They also requested the plaintiff to present the cheque for payment on 15th March, 1970. The defendants undertook that, if the cheque was dishonoured for any reason, they would pay the said amount of Rs. 55,000 on demand together with interest at eighteen per cent. per annum till the date of payment. According to the plaintiff, though the *thavanai* period expired on 15th March, 1970 at the request of the defendants, the plaintiff did not present the cheque for payment until 4th May, 1970. When ultimately the cheque was sent to his bankers (Indian Bank, Town-hall Road Branch) for collection on 4th May, 1970, the same was dishonoured, and was returned with the endorsement "Refer to the drawer."

2. Thereafter the plaintiff sent the suit notice (Exhibit A-5) dated 8th May, 1970 claiming the amount, together with interest. The reply (Exhibit A-6) given by the defendants is couched in dubious language. No doubt, the defendants deny the borrowing, but would say that the purpose for which the cheque had been issued had been suppressed by the plaintiff. They did not, however, disclose the so called purpose for which the cheque was issued by them. They would further maintain that due to some misunderstanding the notice was sent by the plaintiff and they reserved their right to file a "detailed statement", disclosing all the particulars in respect of all the transactions they had with the plaintiff and also the purpose of which the cheque was issued. At the end, however, they would conclude by saying that they were making arrangements to settle the plaintiff's account. As the reply did not apparently satisfy the plaintiff, he instituted the present suit for the recovery of a sum of Rs. 58,025 with subsequent interest on the principal amount and the costs of the action.

3. Defendants 1 to 3 in their common written statement denied the suit claim and denied that the bearer cheque was given by them in consideration of the borrowing of cash made on 26th February, 1970. They would attribute motive to the plaintiff in the matter of the presentation of the cheque and the resultant endorsement obtained by him from his bankers, and would categorically allege that the plaintiff cheated them, on account of some ill-feeling and misunderstanding. According to them, the plaintiff was not possessed of sufficient funds on 26th February, 1970 to lend the sum of Rs. 55,000 on that day. They would refer to the other suit filed by the plaintiff's wife, which is the subject-matter of Appeal No. 533 of 1971, which in turn arises from the judgment and decree in O.S. No. 299 of 1970 on the file of the same Court

and would say that it was in connection with their dealings with the plaintiff's wife that they gave the bearer cheque. They would incidentally state that the claim of the plaintiff's wife in O.S. No. 299 of 1970 is also to some extent false, and that the present suit has been filed only to harass the defendants and to support the claim of the plaintiff's wife. They have invented in their written statement a defence which was not disclosed in their earlier reply notice, but which they would whisper in a telegram given (Exhibit B-7) at or about the time when the suit was about to be filed, and would reiterate it in their written statement. According to the defendants, in February, 1970 the plaintiff was in need of money for the marriage of his daughter, that he demanded repayment of the moneys due by the defendants to his wife, that *though they had liquid cash with them*, they could not accommodate the plaintiff and that it was at the suggestion of the plaintiff that they issued the cheque for Rs. 55,000, so that he would discount the same with third parties, realise whatever amount he could and give credit for the same towards the debt due by the defendants to the plaintiff's wife. These were the circumstances, according to the defendants, which led to the drawing of the bearer cheque and therefore they would urge that no consideration passed under the cheque and that the suit based on such a negotiable instrument was not sustainable.

4. In the reply statement filed by the plaintiff, he reiterated that the cheque Exhibit A-1 was supported by consideration and that the dealings which the defendants had with the plaintiff's wife were totally independent and distinct from the suit cheque on which the present action was based. The plaintiff further denied every one of the allegations made by the defendants in their written statement.

The following issues were framed in that action by the trial Court.

1. Whether the cheque for Rs. 55,000 on 26th February, 1970 and the discount letter were given by the defendants to the plaintiff for the reasons stated in the written statement ?

2. To what relief, if any, is the plaintiff entitled ?

5. The learned Subordinate Judge, after hearing the parties, and particularly basing his inference on conjecture, was of the view that the cheque of Rs 55,000 was not supported by consideration and that therefore no action could be laid on it. While dealing with it, the learned Subordinate Judge admitted that the onus of proof lay heavily on the defendants under the provisions of the Negotiable Instruments Act to dislodge the presumption which would usually arise on a negotiable instrument which *ex facie* did not suffer from any material defect, which ought to be taken judicial notice of. He would also find that the defendants had similar dealings with the plaintiff on prior occasions, but he would not countenance the plaintiff's theory that the suit cheque was one which was also given by the defendants in the usual course of such discounting transactions. According to the learned Judge, the onus was on the plaintiff to establish that he had sufficient funds on that day to lend the money, and, in order to fortify his finding that the plaintiff was not possessed of such funds, the learned Subordinate Judge inspects the account books produced by the plaintiff, Exhibit A-16, et seq and found that there was a shortage of Rs. 934.45 on the date of the alleged borrowing and that this circumstances by itself was sufficient to come to the conclusion that the plaintiff did not have the entirety of the sum of Rs. 55,000 on the date of Exhibit A-1. Incidentally it became necessary for him to examine the accounts produced by the defendants so as to find out whether the burden which lay heavily on them had been discharged, to avoid the suit claim. On more than one occasion in the course of his judgment the learned Subordinate Judge found that the account books produced by the defendants (set out in paragraph 24 of his judgment) were defective and contained many serious defects. It is unnecessary for us to repeat the opinion expressed by the learned Subordinate Judge about the accounts produced by the defendants and the inherent defects which were *prima facie* demonstrated therein. But, for reasons

not very clearly given, he would say that, though there were defects, and serious defects, in the account books, they did not necessarily show that the entire accounts should be disbelieved. He therefore accepted the contention of the defendants that, in the absence of any entry regarding the borrowing of the sum of Rs. 55,000 on or about the date when Exhibit A-1 was issued the conclusion, according to the learned Subordinate Judge, was irresistible that the suit claim was false. He therefore dismissed the suit. Hence the appeal (Appeal No. 260 of 1971).

6. In the other suit (O. S. No. 299 of 1970 the pleadings are simple and the defence also is equally simple. The suit was laid by the plaintiff's wife for the recovery of a sum of Rs. 1,20,000 representing the principal on a promissory note dated 18th August, 1968 (Exhibit A-4) together with interest thereon, which amounted to Rs. 32,600. The total claim was for the recovery of Rs. 1,52,600 prior to the institution of the suit, the plaintiff's wife gave a counsel's notice (Exhibit A-7) which was also duly replied by the defendant's counsel, under Exhibit A-8. In the reply notice the defendants admitted the execution of the promissory note, but would add, without any particulars, and without any explanation thereto, that, "it is not correct to say that the interest has been paid up to 16th September, 1968". After referring to the various prior transactions had by them with the plaintiff, they would say that they were making arrangements to pay the entire amount within three months from the date of the reply notice. As we said, the defendants did not set out in the reply notice any payment or plead partial discharge of the amount payable on the suit promissory note. Whilst this was the position in their written statement, they would plead partial discharge. They would refer to a payment of a sum of Rs. 29,690 said to have been paid by them from 21st August, 1968 till 15th March, 1970 (both days inclusive) as per the statement of accounts produced by them along with their written statement. Here again, the manner in which the amounts were paid or the persons through whom the amounts were sent are not set out, either in the body of the written statement or in the accounts produced by them. They would baldly claim credit for a sum of Rs. 29,690 paid by them towards the principal and interest and prayed that the necessary decree might be passed with proportionate costs.

7. We have already referred to the fact that the learned Subordinate Judge tried both the suits together and rendered a common judgment. He framed the following issues on the pleadings as above:

1. Whether the suit promissory note dated 18th August, 1968 is in renewal of the prior promissory notes ?

2. Whether the interest has been paid only up to 18th September, 1968 ;

3. Whether the payment of Rs. 29,690 on various occasions pleaded by the defendants is true ?

4. What is the amount due to the plaintiff ?

5. To what relief, if any, is the plaintiff entitled ?

The learned Subordinate Judge found that the suit promissory note was executed by the defendants and that it was supported by consideration. He accepted the story developed by the defendants in the witness box through their witnesses that the sum of Rs. 29,690 had to be given credit for to the defendants by the plaintiff. Here against he not only relied upon the testimony of the witnesses examined on the side of the defendants but also once again placed reliance upon the accounts which were characterised by him as containing defects, and serious defects, and decreed the suit claim less Rs. 29,690 with proportionate costs on concessional scale. It is as against this, Appeal No. 533 of 1971 has been filed.

8. We shall first take up the account books produced by the respective parties so that it would not be necessary for us to refer to them once again in the course of our judgment. The defendants have produced their accounts. Exhibits B-63 to B-98 are entire in their ledger filed by the defendants. The learned Subordinate Judge himself admits that

a perusal of the entries in Exhibit B-63 along with those in Exhibit B-84 clearly showed that not only was the ink different, but also was the handwriting different. He was not prepared to accept the theory of the defendants spoken to in the witness box by D.W.3 that they had been written by one and the same person. He would also condemn D. W. 1, who was anxious to support the defendants and was prepared to swear that it was the same persons who wrote all the entries. On a further examination of all the relevant entries and the pages in the account books the learned Subordinate Judge was constrained to find that certain papers in the ledger were moving up and down and were not closely stitched. He would however, explain it away by saying that, on account of frequent user, the paper might have become loose. It is difficult to believe that the crucial paper alone, which is relevant to the instant case, was moving up and down, whilst the other papers were intact, in the account book. There is therefore something very strange about this paper. We have already referred to the fact that this was written by some one and not by Sundararajulu Naidu, as claimed by D. W. 1 and supported by D. W. 3. Against in the so-called regularly kept account book, there is no continuity in the numbering of pages. Pages 610 to 631 have been corrected to 510 to 531. Thereafter from pages 532 to 541 the figure '5' has been written in pencil at the top of the figure '6'.This curious account book is explained away by the defendants by the gullible explanation that there was defect in the numbering of the pages of the original ledger itself. This apart, the learned Subordinate Judge himself discovered a serious defect, in that the entries in Exhibits B-63 and B-75 appeared to be in different handwritings and that the entries subsequent thereto were written by the same person, but his manner of writing the word "பற்று" was different. A stale explanation was given by the defendants which went home to the learned Subordinate Judge. But we agree with him that this is one of the many serious defects which he discovered, but which he tolerated and ultimately excused.

9. On the other hand, the account books produced by the plaintiffs have no such defects. But the reason why the learned Subordinate Judge did not place any reliance on the account books of the plaintiff, Exhibit A-16 *et seq*., was that on totalling up the amount available with the plaintiff on the date when the suit transaction took place their cash fell short of a sum of Rs. 943.45. He would not accept the explanation of P.W. 3 that they had to borrow a sum of Rs. 1,000 from a third party to make up this amount which was given in cash to the defendants. We are referring to this aspect at this stage only to reiterate that in our view, the account books of the plaintiff's case that, on the date when the cheque was issued by the defendants, a sum of Rs. 55,000 was lent by the plaintiff to the defendants as evidenced by the entries in the account books.

10. Having thus touched up on the account books of the respective parties, and having found that we are unable to place any reliance upon the accounts produced by the defendants' we shall now consider the various points, that the plaintiff did not have sufficient cash to perform the marriage of his daughter in February, 1970. The defendants themselves had to admit, both in their written statement and when one of them was in the witness box, that the plaintiff was a money-lender and a well-to-do person. The suggestion therefore that the plaintiff had to borrow money for the performance of the marriage of his daughter appears to be rather strange. If this evidence of the defendants is really true, one would expect that the defendants-borrowers should have jumped at it and incorporated it in their reply notice when they gave, through counsel a reply to the notice of demand. But, on the other hand, nothing of the kind happened. The reply notice is camouflaged and deliberately misleading. The defendants as borrowers, and as is usual with borrowers, denied the loan, but reserved their right to file a 'detailed statement' disclosing the particulars in respect of that transaction and also the purpose for which the cheques was issued. What prevented them from stating the purpose for which the cheque was issued, which they later

thought of in the telegram (Exhibit B-7) and in their written statement, is not at all clear. They would refer to some misunderstandings between themselves and the plaintiff. Probably this was the reason why they were not prepared to say anything at that time, but reserved their right to develop their defence according to circumstances and their convenience. We are unable to follow the unequivocal statement made in Exhibit A-6 by the defendants in reply to the plaintiff's notice, when they stated, that they were making arrangements to settle "your client's account". We have already touched upon the defence of the defendants. They would say that the cheque was given in relation to an admitted debt due and owing by them to the plaintiff's wife. Thereby they would make it appear that they had nothing to do with the plaintiff and that there was no account of the plaintiff for being settled. Yet they would say in their reply notice that they were making arrangements to settle the plaintiff's account. If there was no account the question of settling a non-existing account would not arise. This by itself is a positive indication that even at the outset the defendants wanted to wriggle out of the transactions and, if possible, evade payment by raising defences at convenient times as and when occasion arose.

11. One such circumstances which prompts us to hold that the story of the defendants that the plaintiffs wanted to borrow money and requested the defendants for accommodation by giving a bearer cheque to enable him to discount the same, is not true is borne out by the attitude of the defendants themselves in the course of the trial of this litigation. When the plaintiff was in the box, no suggestion was put to him that he had no funds on that day and that that was why he had to make a circuitous arrangement for raising finance to perform the marriage of his daughter. Mr. D. Ramaswami Iyengar, learned counsel for the respondents (defendants) is unable to point out, from the evidence of the plaintiff as P.W.1, that any such suggestion was put to him when he was in the box. The defendants were therefore not sure of their own stand: they were not courageous enough to face the plaintiff and bring home to him the so-called story which they weaved out rather late and which they would not set out in their reply notice.

12. The next question is whether the account books of the defendants, so far as this case is concerned, could be relied upon. The learned Subordinate Judge referred to those accounts and found that there was no entry of receipt of this sum of Rs. 55,000 therein. Having, expressed that view, he went into the other question. Whether the plaintiff had the necessary funds with him on that day, to lend the sum of Rs. 55,000. The defendants and the plaintiff are businessmen and both are shrewd enough and well acquainted with men and matters. It was impossible for the defendants to have acted in the manner they did. Exhibits A-3 may be referred to in the first instance. There is a categorical admission in this letter that they have received cash less discounting commission of Rs. 421-50. They would also request the plaintiff to present the cheque for payment on 15th March, 1970. One would expect the defendants to repudiate this letter, when they had the opportunity to do so. In their reply notice, Exhibit A-6 there is no reference to this letter at all, which *prima facie* is clear and clinching, in that the defendants themselves have acknowledged the receipt of cash of Rs. 55,000 in Exhibit A-3. Persons in the position of the defendants, who are businessmen, should have at least stated in the reply notice the circumstances under which they wrote Exhibit A-3. Even th[illegible] absent. There is no suggestion in that letter that the plaintiff did not have the necessary funds with him to lend.

13. With this background, we shall now look into the accounts of the plaintiff. The day-book produced by the plaintiff did show that he had sufficient funds to lend the sum of Rs. 55,000. No doubt, on a microscopic examination of the credits with the plaintiff, the learned Subordinate Judge was at pains to discover that there was a shortage of Rs. 934-45. Even this was explained by P.W.3 when he was in the witness box,

when he stated that they provided themselves with another sum of Rs. 1,000 from the son-in-law of the plaintiff. There is nothing improbable in this. The entire transaction is a cash transaction. It is not for the borrower to delve into the manner in which the creditor obtained his cash. It is not pretended that this cash was paid only from the funds of the business carried on by the plaintiff. The question is whether the cash of Rs. 55.000 was paid on that day or not. Fortunately for the plaintiff, the sum total of the cash available with him as per his accounts fell short by a sum of Rs. 934-45. He tried to bridge the gulf by saying that another sum of Rs. 1,000 was borrowed from his son-in-law, to make up the cash advanced. There is nothing improbable in this, in the light of Exhibit A-3 which is not even attacked by the defendants as a letter which had been extracted or forced out of them by the plaintiff, at any material point of time. We are therefore unable to believe the defendants' case that the plaintiff did not have the requisite cash on 26th February, 1970, for him to lend to them the sum of Rs. 55,000.

14. The defence in the main of the defendants was that it was to raise funds to meet the expenses of the plaintiff's daughter's marriage that this method was adopted by the plaintiff in co-ordination with the defendants. If this was the real truth, there was nothing to prevent the defendants from setting out such a state of affairs and instructing their counsel to set out the same in their reply notice. According to the plaintiff, when the *thavanai* period was over the defendants were repeatedly requesting him for time for payment and that it was in consequence of such approaches that the cheque was not presented to his bankers for collection. This is more probable, for, having known that the cheque was to be presented on 15th March, 1970, and having known that the cheque was likely to be presented which would result in prejudice to them, the defendants kept quiet and did not even give a mandate to the plaintiff not to present the cheque for payment and cause inconvenience to them, but on the other hand, they gave a telegram (Exhibit B-7) which ran as follows:

"On behalf of the proprietors of Sri Devi Talkies: My clients having dealings in money with you from the time of their father. Yourself collecting excess interest in all transactions. Accounts never settled. But to oblige you my clients executing promissory notes the last of which was for Rs. 1,20,000 in the name Sevuga Achi. The said pro-note not fully supported by consideration. Accounts to be looked into for arriving at the correct amount due. On 26th February, 1970, yourself demanded money for your daughter's marriage. My clients could not accommodate you then. Cheque for rupees 55,000 issued to you on your representation that you would discount the cheque and realise money for immediate expenses. No borrowing on that date from you. My clients paying you every day rupees 50 to 150 depending on collections from the theatre towards the amount due by them. Daily payments received by your accountant and signed in small note books. My clients mother's deposit with you stand as security for my clients borrowings. My clients ready to settle account. Kindly do not precipitate matters and arrange for settlement. Letter follows".

15. If such detailed information was available to them on the date when the telegram was given, *viz.*, 2nd July, 1970, what prevented them from subscribing to such a story in Exhibit A-6 dated 27th May, 1970 passes one's comprehension. Having regard to the conduct of the defendants and the manner in which they have led or misled the plaintiff, until he came to Court, we are unable to place any reliance on Exhibit B-7 or on the story later weaved out by the defendants in their written statement that the cheque was not supported by consideration, and that it was given by them in the circumstances set out by them in the telegram and reiterated by them in their written statement.

16. We are unable to subscribe to the reasoning of the learned Subordinate Judge that the defendants have discharged their onus, that the plaintiff has failed to establish that there was a lending on

26th February, 1970 and that the cheque (Exhibit A-1) which was taken in return thereof was supported by consideration.

17. In Chapter XIII of the Negotiable Instruments Act special rules of evidence are laid down in the matter of presumptions which ought to arise on negotiable instruments. Until the contrary is proved, every negotiable instrument which is duly made or deemed to have been made should *prima facie* be held to be one supported by consideration.

In *Narasamma* v. *Veeraraju*[1], Varadachariar J., observed :—

> " Any presumption as to quantum of consideration as distinguished from the mere existence of consideration, has to be drawn, not by virtue of section 118, Negotiable Instruments Act, or even under section 114, Evidence Act, but only from the recitals if any, that the instrument may contain. As to such recitals, it has long been established that being *prima facie* evidence against the parties to the instrument, they may operate to shift on to the party pleading the contrary, the burden of rebutting the inference raised by them. But the weight due to recitals may vary according to circumstances, and, in particular circumstances, the burden of rebutting them may become very light, especially when the Court is not satisfied that the transaction was honest and *bona fide*."

18. Even the Supreme Court in its later decisions has reiterated the same principle and observed that the presumption under section 118 of the Negotiable Instruments Act shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant, that the defendant may adduce direct evidence to prove that the promissory note was not supported by consideration and that, if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. It is therefore clear that the burden is ambulatory : at one time it is on the plaintiff, and according to the proof and circumstances, it shifts on to the shoulders of the defendant. But in the instant case we have referred to Exhibits A-1 and A-3 as also the subsequent conduct of the defendants till they sent the telegram, Exhibit B-7; the entire course of conduct of the defendants and the recitals in the documents do not give us the impression that the suit transaction was not honest and *bona fide*. On the other hand, the defence of the defendants does not appear to be so, and, in fact, it was developed from time to time. Again the plaintiff having proved the negotiable instrument and the defendants having admitted the execution thereof, the burden shifted on to the defendants to prove that the cheque (Exhibit A-1) was not supported by consideration. This they could establish only by acceptable evidence, which could also be circumstantial. But we are at a less to find any such acceptable material or circumstantial evidence in this case let in by or available to the defendants, so as again to shift the burden on to the plaintiff for him to prove that there was consideration for the suit cheque. Having regard to the fact that the defendants were shifting their attitude from time to time when they ought to have protested, they did not, and at the material point of time when they should have fully spoken, they kept delightfully silent, we are of the view that the suit claim is true and that the learned Subordinate Judge was not right in having dismissed the suit of the plaintiff.

19. We shall now deal with Appeal No. 533 of 1971. As we said the only plea of the defendants in the course of the trial, though not at a stage when they could have set it out either in their reply notice or in their written statement, was that they had paid a sum of Rs. 29,690 which could be compartmentalised thus: a sum of Rs. 22,615 said to have been paid by the defendants but without vouchers, for which they rely upon the self-serving entries in their accounts, a sum of Rs. 4,225 vouched by P.W. 3 and one Shanmugam Pillai who has not been examined, and as evidenced by Exhibits B-23 to B-56 ; a sum of Rs. 2,350 as per entry made by Shanmugam Pillai, who

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1. I.L.R. 58 Mad. 841 : A.I.R. 1935 Mad. 769.

has not been examined, and said to be contained in Exhibit B-57, a pocket notebook kept by Shanmugam Pillai; a cheque for Rs. 500 said to be given to P. W. 2 as seen from Exhibit B-99 who cashed it and gave it to the plaintiff. We shall now consider the first alleged payment of Rs. 22,615. While on this, it is necessary for us to remind ourselves about the manner in which the defendants maintained their accounts. We have already expressed our considered view that the accounts are not reliable and dependable. Apart from this, a borrower who claims that he has paid a sum of Rs. 22,615 to his lender, should not be content with merely depending upon the entries made in his (borrower's) account, without the same being contemporaneously vouched for or evidenced by any voucher given by the lender or some one on his behalf. Not only for the reason that we have grave doubts and suspicion about the account books produced by the defendants, but also on the well-known principle that a borrower canot rely on his own self-serving entries in his accounts for the purpose of furthering his cause, we are unable to place any reliance upon the story of the defendants that a sum of Rs. 22,615 was paid to the plaintiff as pleaded by them.

20. Next, a sum of Rs. 4,225 is said to have been paid through P.W. 3 and one Shanmugam Pillai under Exhibits B-23 to B-56. We have seen the vouchers. Here again there is something very curious about them. On the back of each of the vouchers we find a revenue stamp affixed and duly crossed, and the contents in front of the vouchers are so meagre. This is invariably the case with each of the vouchers. This is pressed into service as a payment said to have been made by the defendants on account of the plaintiff, through P.W. 3. Fortunately for the plaintiff and unfortunately for the defendants, P.W. 3 who went into the box would swear that these transactions had nothing to do with the suit promissory note and that, if he had received any payment from the defendants, it was in his own individual capacity and did not have any impact upon the suit transaction. We believe P.W. 3 and disbelieve the defendants. One part of the above sum of Rs. 4,225 is said to have been paid through Shanmugam Pillai. Even so a sum of Rs. 2,350 is said to have been paid to the plaintiff as seen from Exhibit B-57. It is not claimed that Shanmugam Pillai was not available for examination. As to why he has been kept out of the box, there is no explanation. In the light of such disclosed facts and circumstances, and in the halo of suspicion created by the defendants' conduct and their manner and method of proof we are unable to accept the uncorroborated testimony of the defendants' witnesses that a part of Rs. 4,225 and a sum of Rs 2,350, as evidenced by Exhibit B-57 (pocket notebook said to have been kept by Shanmugam Pillai) were paid in discharge of the suit debt.

21. As regards the last item of discharge *viz.*, a payment of Rs. 550, the defendants rely upon Exhibit B-99 which is a cash cheque drawn by the defendants, and signed by one of the partners at the back of the cheque and said to have been cashed by S. Palaniappan. Palaniappan was an ex-employee of the plaintiff and in order to set at nought the cloud over this particular transaction, the plaintiff examined Palaniappan as P.W. 2. He would swear that he no doubt cashed the cheque given by the defendants but it was not intended that he should pay the said amount of Rs. 500 to the plaintiff and that after encashment of the cheque he paid back the amount of Rs. 500 to the defendants themselves. There is no reason why we shoud not believe this natural version given by P.W. 2.

22. We have already referred to Exhibits A-7 and A-8 which are the suit notice and the reply. In the reply, Exhibit A-8, the defendants say that it is not correct to say that interest has been paid up to 16th September, 1968. In their written statement they would say that towards the promissory note debt they had paid Rs. 29,690 between 21st August, 1968 and 15th March, 1970. Exhibit A-8 is dated 16th May, 1969. If, according to the defendants, they knew that they had paid considerable sums of money to the plaintiff between August, 1968 and March, 1970, when Exhibit A-8

and was issued in May, 1969, nothing prevented them from stating how they had paid the amounts and through whom. There is no whisper about it or about the persons through whom such amounts or parts of such amounts were sent. In particular, there is no reference, in the reply notice or in the written statement to the names of P. W. 3 Shanmugam Pillai or P. W. 2. The plea of discharge set up by the defendants is absolutely untrue, and it is surprising that the learned Subordinate Judge should have placed reliance upon such unreliable evidence adduced by the defendants before him for accepting the plea of discharge. We are therefore unable to believe, on the materials noticed by us, that the story that the defendants paid a sum of Rs. 29,690 to the plaintiff in the manner stated by them can ever be true. The plaintiff is therefore entitled to a total decree.

23. In the result both the appeals are allowed with costs.

K.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M.M. Ismail, J.*

State of Madras, represented by the Special Tahsildar for Land Acquisition, Harijan Welfare, Salem. .. *Appellant**

v.

M. G. Varadarajulu (died) and others .. *Respondents.*

Land Acqusition Act (I of 1894), section 18—Award by Land Acquisition Officer—Petition for enhancement in — Court rejecting evidence produced by owner—Enhancing compensation arbitrarily—Awarding of interest at 6 per cent.—Validity of order.

On a reference under section 18 of the Land Acquisition Act, the burden is on the owner of the land who claims higher compensation to prove that the compensation awarded by the Land Acquisition Officer is inadequate and to prove what is proper and reasonable compensation which should have been awarded to him. If all the evidence produced by the owner before the Court is rejected, the Court has no alternative but to confirm the award of compensation made by the Land Acquisition Officer, because under the law the Court has no power to reduce the compensation fixed by the Land Acquisition Officer. The Court has no jurisdiction to enhance the compensation arbitrarily. Under the law the interest to which an owner of a land is entitled is 4 per cent. and not 6 per cent. [*Paras.* 8 *and* 9.]

Appeal against the decree of the Court of the Subrodinate Judge, Salem dated 19th April, 1969, in O.P. Nos. 203 of 1966 and 19 of 1968 respectively.

The Additional Government Pleader, for Appellant.

R. Desikan and *Kulandaivelu*, for Respondents.

The Court delivered the following

JUDGMENT :—A.S. No.173 of 1970 arises out of O.P. No.203 of 1966 while A.S. No. 174 of 1970 arises out of O.P. No. 19 of 1968, both on the file of the Court of the Subordinate Judge of Salem and both of them being references under section 18 of the Land Acquisition Act. The former appeal is concerned with the quantum of compensation payable for 3 acres and 68 cents of lands, while the latter appeal is concerned with the quantum of compensation payable for 4 cents of land, both the lands having been acquired for housing Harijans in Seelnaickenpatty, pursuant to a notification under section 4 (1) of the Land Acquisition Act dated 10th March, 1965. The Land Acquisition Officer awarded compensation at 8 paise per square foot, which was enhanced to 20 paise per sq. ft. by the learned Principal Subordinate Judge of Salem by the impugned order dated 19th April, 1969. The State has preferred these two appeals against the said enhancement principally contending that there was no material whatever before the learned Subordinate Judge to justify the above enhancement and also that the learned Subordinate Judge erred in awarding interest at 6 per cent. per annum.

* Appeal Nos. 173 and 174 of 1970.
19*th March*, 1975.

2. The learned Subordinate Judge has written an elaborate judgment in which he has discredited the witnesses of the claimants and has also rejected all the evidence produced before him. The learned Subordinate Judge made a personal inspection of the lands acquired and has noted the features of the lands present as a result of his personal inspection. Before I refer to the impressions of his personal inspection. I shall deal with the documentary evidence in the case first.

3. The rate of 8½ paise per sq. ft. was fixed by the Land Acquisition Officer on the basis of Exhibit B-1 dated 27th July, 1964, registration copy of a sale deed, under which 1 acre and 11 cents were sold at Rs. 3,604 per acre. The learned Subordinate Judge rejected that sale deed on the ground that the land covered by that sale deed is a bit away from the acquired lands and the facilities which the data lands have may not be available for it. On the other hand, Mr. R. Desikan, learned counsel for the respondents herein, sought to sustain the award of compensation made by the learned Subordinate Judge, with reference to Exhibits A-1 to A-6.

4. The learned Subordinate Judge refers to Exhibits A-1 to A-3 dated 31st April, 1962, 6th August, 1962 and 16th November, 1963 respectively, in paragraph 13 of his judgment under which the rate worked out to 72 paise per sq. ft.. The learned Subordinate Judge has pointed out that the lands covered by Exhibits A-2 and A-3 are at Dhadhagapatti Village, that it was suggested to P. W. 1 that those lands are 7 furlongs away, that he admitted that there are 8 garden lands between the acquired lands and those lands, that he also categorically admitted that the lands covered under Exhibits A-1 to A-3 are adjacent to Weavers' Co-operative Society Colony and naturally the value would be comparatively very high that P.W. 2 spoke to the sales under Exhibits A-4 and A-5 that it was elicited from him that Exhibits A-4and A-5 lands are near Trichy. main road and two flour mills had been put up in those sites and that therefore Exhibits A-4 and A-5 could not help to ascertain the correct market value of the acquired lands. Exhibit A-6 dealt with a land 19×20 and the consideration therefor is Rs. 1,000. P.W. 3 who spoke about Exhibit A-6 admitted that adjoining the land covered under Exhibit A-6 is a housing colony and on one side is the Nattamangalam road and on another side built up residential areas. Therefore, Exhibits A-1 to A-6, having regard to the special features and the qualities of the lands dealt with thereunder, cannot be of any help to ascertain the market value of the acquired lands. As a matter of fact R. W. 1 in his evidence stated that he did not consider Exhibits A-1 to A-6 sales because the lands sold thereunder were sold as house-sites. He also stated that those lands were six furlongs away from the acquired lands. With regard to the observation of the learned Subordinate Judge that the lands covered by Exhibits A-2 and A-3 are in Dhadhagapatti village, the learned counsel for the respondents invited my attention to the statement of R.W. 1 in his further cross-examination that Exhibits A-1 to A-6 lands are inside the village limits. Even assuming that the lands covered by Exhibits A-1 to A-6 are inside the village limits, that will not mean that the lands dealt with thereunder are comparable to the lands acquired, for the reasons I have already indicated on the basis of the discussion of the learned Subordinate Judge in the course of his judgment. Thus, it will be seen that Exhibits A-1 to A-6 cannot be of any assistance whatever to the respondents herein.

5. Even assuming that any assistance can be derived from Exhibits A-1 to A-6, they do not show the market value at 20 paise per sq. ft. which has been fixed by the learned Subordinate Judge in the present case. There must be some material or some reasoning for fixing compensation for the lands acquired at 20 paise per sq. ft., and admittedly the learned Subordinate Judge has not given any reason whatever for fixing the compensation at 20 paise per sq. ft.

6. Now, I shall refer to the impressions and the record made by the learned Subordinate Judge as a result of his personal

inspection. The notes of inspection themselves have been marked as Exhibit C-1. According to the learned Subordinate Judge :

"The land acquired is a triangular piece of land abutted on the east and south by two roads, and there is a country road west of it. There are cultivable lands east of the eastern road, west of the cart track, and south of the acquired land. There is a burial ground which is just east of the eastern road. On the southern side within a few yards, the village proper begins. Considering the fact of the cultivable lands being situated on three sides, it cannot be stated that it was unfit to be a cultivable land. Even the claimants do not dispute the fact that prior to 1961, it was an agricultural land. As it abuts the village and abuts the road, it may be used as house sites. The adangal Exhibit B-3 had been filed to show that there had been cultivation of cotton even in 1963. Considering the above fact, it could be stated that the land was an agricultural land, and because it could be used as house sites, it had been acquired for Harijan Colony.

The above statement of the learned Subordinate Judge is contained in paragraph 6 of his judgment. In paragraph 14 of his judgment, the learned Subordinate Judge again stated :

"It is clear from the notes of inspection and from the evidence that there are Harijan colonies on two sides of the acquired land. On one side of the acquired land, there is a drainage running south of the acquired land in which the tannary refuse water flows and it was emanating a stinky smell. Within a few feet of the acquired property, there is a burial ground and north of the acquired portion, there is a stream and there was no water at the time of the inspection. Situated under those surroundings, it is not likely to fetch a decent price as suggested by the claimants. Further, the property is only in a minor Panchayat and there were no signs of any development within a few furlongs from the acquired land. It is seen from the evidence of R.W. 1 that there are only 200 houses in that place and except one or two small terraced houses all other houses are only tiled and thatched houses. Having seen the locality and the place, I feel that it cannot be stated that as a house site, it would have high potential value. It was also stated by R.W. 1 that there was not much demand for house sites in that place. On the other hand, I find that new buildings were coming up in and around the sites covered under the documents produced by the claimant which are very near Weavers' Co-operative housing colony and which is within a very short distance from the Salem Municipal limits. It was also pointed out by the Government Pleader that even the town bus stops only about ½ mile and more away from the acquired land. I did not find any signs of any improvement or development in and around the village proper even. There were only a few shops as stated by P.W. 1."

Having stated so far which are not very complimentary to the acquired land, in the very next paragraph, the learned Subordinate Judge has stated :

"The Land Acquisition Officer had fixed the value on the basis of Exhibit B-1. But that land is a bit away from the acquired land and the facilities which the data land has may not be available for it. Considering all the advantages and disadvantages, I find that the rate could be fixed at 20 paise per sq. ft."

7. Thus it will be seen that the fixation of 20 paise per sq. ft. is wholly and completely a guesswork and is arbitrary on the part of the learned Subordinate Judge having regard to the fact that no material whatever was referred to by him for fixing that rate. The learned Subordinate Judge himself has not stated on what grounds and for what reasons he has enhanced the compensation from 8½ paise per sq. ft. to 20 paise per sq. ft. In all these matters an element of guess work is inevitable and compensation in respect of the acquired lands cannot be arrived at with any mathematical accuracy or maticulous exactitude. None-the-less there must be some material placed before the Court on the basis of which alone compensation should be fixed. In this case a reading of the judgment clearly shows that the learned Subordinate

Judge rejected every bit of evidence produced on behalf of the respondents herein and still went on to fix the compensation at 20 paise per sq. ft.

8. Mr. R. Desikan, learned counsel for the respondents, contended that in paragraph 15 of the judgment extracted already, the learned Subordinate Judge has considered and rejected Exhibit B-1 and then only arrived at the market value of the acquired lands and therefore he was justified in enhancing the compensation to 20 paise per sq. ft. I am unable to accept this argument. On a reference under section 18 of the Land Acquisition Act, the burden is on the owner of the land who claims higher compensation to prove that the compensation awarded by the Land Acquisition Officer is inadequate and to prove what is proper and reasonable compensation which should have been awarded to him. If all the evidence produced by the owner before the Court is rejected the Court has no alternative but to confirm the award of compensation made by the Land Acquisition Officer, because under the law the Court has no power to reduce the compensation fixed by the Land Acquisition Officer. Therefore simply because the learned Subordinate Judge has chosen to reject Exhibit B-1 it cannot be contended that he has any jurisdiction to fix the compensation at 20 paise per sq. ft. arbitrarily.

9. The learned Subordinate Judge has also stated that the claimants would be entitled to get compensation with 6 per cent. interest. It is admitted that under the law the interest to which an owner of a land is entitled is 4 per cent. and not 6 per cent. Therefore, the learned Subordinate Judge has erred even in this behalf. Consequently on the compensation fixed by the land Acquisition Officer, the respondents-claimants would be entitled to interest only at 4 per cent. per month.

10. Under these circumstances, I have no alternative but to allow the appeal preferred by the State and accordingly the appeals are allowed, the enhancement of compensation ordered by the learned Principal Subordinate Judge is set aside and the compensation awarded by the Land Acquisition Officer will stand restored and the same will carry interest at 4 per cent. per month.

11. There will be no order as to costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

Bhagavathy Pillai (died) and another .. *Appellants**

v.

Savarimuthu and another .. *Respondents.*

Limitation Act (IX of 1908), *Articles* 142 *and* 144—*Limitation Act (XXXVI of* 1963), *Articles* 64 *and* 65—*Suit for possession of immovable property based on title—Plea of adverse possession—Article applicable.*

Articles 142 and 144 of the Limitation Act, 1908, gave rise to a good deal of confusion with respect to suits for possession by owners of property. The law as it stood appeared to favour a trespasser as against an owner; the decisions had held that in an ejectment action, by the owner of the property it was not sufficient for him to establish his title, but he had also to go further and establish that he was in possession of the property within 12 years before the date of the institution of the suit. In order to redress this anomaly, Articles 64 and 65 of the Act of 1963 were suitably altered. Article 64 deals with suits based on possession and not on title. In such a case the plaintiff, who while in possession had been dispossessed, could file a suit within a period of 12 years from the date of dispossession. For the purpose of Article 64 there is no question of proving title. Article 65 relates to suits for possession based on title. In such a case the period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Article 65, the defendant wants to defeat the rights of the plaintiff, he has to establish his adverse possession for a period of

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* S.A. No. 70 of 1972. *4th April, 1975.*

12 years, which has the effect of extinguishing the title of the owner by the operation of section 27 of the present Act. If he fails to do so then the plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years.

[*Para.* 9.]

Cases referred to :—

Alam Khan Sahib v. *A. L. M. Karuppannaswami Nadan and others*, (1938) 1 M.L.J. 113 : A.I.R. 1938 Mad. 415 ; *Govindaraj* v. *Kandaswami Gounder and another*, I.L.R. (1957) Mad. 1245 : (1956) 2 M.L.J. 578: A.I.R. 1957 Mad. 186.

Appeal against the decree of the Court of the Subordinate Judge, Nagercoil dated 19th November, 1970 and passed in Appeal Suit No. 151 of 1970 preferred against the decree of the Court of the District Munsif of Nagercoil in Original Suit No. 162 of 1967.

P. Ananthakrishnan Nair, for Appellants.

S. Padmanabhan, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. They instituted a suit against the defendants for eviction and for removal of buildings and delivery of vacant possession of the property and for costs. The plaintiffs belong to a tarwad, which became divided on 2nd August, 1907 under which the karnavan one Velayudhan Narayanan got the entire property. The branch of the plaintiffs, who were the Seshakars of the said Velayudhan Narayanan, divided the property in 1926. The property devolved on the first plaintiff and her mother, and on the death of her mother, the first plaintiff became entitled to the property. There was a partition between the first plaintiff and her children on 17th December, 1953 and in the said partition the property set out in the schedule, comprising about 8 cents, fell to the share of the plaintiffs. Having traced title to the said property in the aforesaid manner, the plaintiffs alleged that the defendants had put up small buildings with the permission of the karnavan and that they had to be removed and the site restored to the plaintiffs. The property is comprised in Survey No. 6610 and the total area is 83 cents. The entire area is said to be a garden, in a portion of which *viz.*, 8 cents therein some buildings have been put up by the defendants.

2. Defendants 1 and 2 filed a written statement, in which they stated that Survey No. 6610 became their property prior to M. E. 1020 corresponding roughly to 1845. According to them their ancestors were in possession. Even on the basis that the plaintiffs had any right to the property, their case was that the plaintiffs had lost their title prior to 1120 M. E. corresponding to approximately 1945. They, therefore, contended that the suit was barred by limitation. They challenged also the right of the plaintiffs to effect a division of the said property. It was alleged by them that the property had been allotted to the branch of one Govindan Udayan. Defendants 3 to 8 are the sons of defendants 1 and 2. Defendants 9 to 13 were tenants at will of defendants 1 and 2. Thus, the written statement of defendants 1 and 2 is practically the foundation on which the whole defence is rested.

3. The trial Court examined the title of the plaintiffs to the property in the light of the exhibits filed by the plaintiffs and the defendants. Exhibit B-1 is a deed of partition in the family of one Govindan Udayan in which Survey No. 6610 was the subject of division. This division was followed up by a further division in Exhibit B-2 and also Exhibit B-3. However, by a document, which was marked as Exhibit A-5, there was a release by one Lakshmi Parvathy Pillai, of the branch of Govindan Udayan in favour of plaintiffs 1 and 2. This document is dated 30th March, 1928. Based on this Exhibit and also on the other mterials referred to by the learned trial Judge, he came to the conclusion that the plaintiffs had title to the suit property. It was pointed out that the defendants had not traced any title from the family of Govindan Udayan so that Exhibit A-5 could be attacked as being collusive.

4. The learned Judge thereafter went into the question as to whether the defendants or their predecessors-in-title were in possession of the property right

from M. E. 1020. On this aspect, he pointed out that defendants 1 and 2 had not stated as to how they got the property prior to 1020. He then referred to the evidence of the second defendant as D. W. 3 in which it was stated that the suit property was in the possession of the defendants under an othi and kuzhikkanam right of the year 1020 M. E. No particulars of the othi deed of 1020 were forthcoming and D.W. 3 had clearly admitted that he did not know whether his father had given evidence before the Settlement authorities claiming title or possession in respect of the suit property under any mortgage deed. This mortgage deed was referred to as Vellala document or a document in palmyrah leaves. Having found that there was no title in the defendants to the suit property, the learned Judge held that they were only tenants at will. The learned Judge referred to the fact that there was no direct evidence in support of the plaintiff's claim that there was, in favour of the defendants, a kuppakacha grant, which means that the tenant is permitted to be in the property subject to his gathering of the cocoanut leaves and surrendering them to the landlord. The learned Judge held that there was no question of adverse possession, as the possession of the defendants was permissive in character. He, therefore, decreed the suit.

5. The first two defendants filed an appeal. The learned Subordinate Judge of Nagercoil after referring to Exhibits A-1 to A-5 and A-23 held, agreeing with the trial Court that the plaintiffs had got title to the suit property. The learned Judge thereafter examined the question of the loss of the plaintiffs' title by adverse possession. He pointed out that as admittedly the defendants were in possession of the disputed property, the burden lay heavily on the plaintiffs to prove their case. According to him, the claim set up by the plaintiffs in the plaint was vague in character and the evidence of permissive possession had not also been established. In view of the vague allegations made in the plaint, of the failure to prove permission and of the possession of the defendants from the year 1087 M. E., he held that the suit was barred by limitation. In the result, the judgment and the decree of the lower Court were set aside.

6. On behalf of the plaintiffs-appellants the submission was that in view of the concurrent finding of both the Courts below on the question of title, the only point that could arise for examination by the learned Subordinate Judge was whether the defendants had proved their title by adverse possession over the requisite period. It was submitted that the defendants did not at all set up any consistent case as to how they came into the property and when possession became adverse. The learned counsel urged that in the written statement there was no plea of any title based on an alleged usufructuary mortgage, which was trotted out only during the oral evidence of the defendant's witnesses and that D. W. 3 had gone, in contradiction of this, even to the extent of alleging a purchase by his grand-mother of the suit property in the year 1018, which case had not been put forward in the written statement. Counsel referred to the admission in the evidence of the defence witnesses that tax had been paid to jenmi thereby admitting the plaintiffs' title to the suit property. It was pointed out that there was no question of any adverse possession on the facts herein and that the burden had been wrongly laid on the plaintiffs by the lower appellate Court.

7. For the respondents (defendants) the submission was that the plaintiffs had to show that they were in possession of the suit property within a period of 12 years prior to the suit and that had not been established. It was urged that even on the basis of the plaint and the evidence of the plaintiffs, the property had been in the possession of the defendants for a long period, so that there was dispossession even as early as 1087 M. E. It would, therefore, follow, according to the learned counsel for the respondents, that the suit was hopelessly barred by time, so that it was rightly dismissed by the lower appellate Court. Counsel also argued that the real question in the present suit was only whether

the plaintiff had proved any permissive possession in the hands of the defendants and that the question of permission is a question of fact on which the appreciation of the evidence by the lower appellate Court could not be disturbed in a second appeal.

8. The suit itself was filed in the year 1967 after the Limitation Act of 1963 came into force. This Act has made certain changes in the law of limitation, which it is necessary to notice at this stage. Under the Limitation Act, 1963 Articles 64 and 65 correspond to Articles 142 and 144 of the Limitation Act of 1908. Article 142 dealt with the suit for possession of immovable property, when the plaintiff, while in possession of the property, had been dispossessed, or had discontinued the possession. In such a case the period of limitation was 12 years from the date of the dispossession or discontinuance. Article 144 related to suits for possession of immovable property or any interest therein not specifically provided for in the schedule to the Act of 1908. The period of limitation was 12 years from the date when the possession of the defendant became adverse to the plaintiff. It may be seen that Article 144 was in the nature of a residuary article, which would come in for application only if there was no other specific provision in the other articles of that Act. In other words, if in a given situation Article 142 could apply, then the residuary Article 144 would be ruled out of the application.

9. Articles 142 and 144 gave rise to a good deal of confusion with respect to suits for possession by owners of property. The law as it stood appeared to favour a trespasser as against an owner, because the decisions had held that in an ejectment action by the owner of the property it was not sufficient for him to establish his title, but he had also to go further and establish that he was in possession of the property within 12 years before the date of the institution of the suit. In order to redress this anomaly, Articles 64 and 65 were suitably altered. Article 64 deals with suits based on possession and not on title. In such a case the plaintiff, who while in possession had been dispossessed, could file a suit within a period of 12 years from the date of dispossession... For the purpose of Article 64 there is no question of proving any title. Article 65 relates to suits for possession based on title. In such a case the period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Article 65, the defendant wants to defeat the rights of the plaintiff, he has to establish his adverse possession for a period of 12 years, which has the effect of extinguishing the title of the owner by the operation of section 27 of the present Act. If he fails to do so, then the plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years.

10. The learned counsel for the respondents was aware of the change in the legal position emerging from the Act of 1963. His endeavour was, therefore, to show that the plaintiffs had lost their right to the property at the time when the new Act came into force and that the new Limitation Act did not revive any right, which had already been extinguished when it came into force. It is in this context that the learned counsel drew my attention to a decision of a Bench of this Court in *Alam Khan Sahib* v. *A. L. M. Karuppannaswami Nadan and others* [1]. The principle of this decision has been set out in the head-note as follows :—

> "Where in a suit for ejectment, the plaintiff sets up in his plaint the case that the defendant is his tenant, it is tantamount to saying that the defendant, when he repudiated his title as landlord, dispossessed him, so that there is in effect an assertion of possession and dispossession precisely what is contemplated under Article 142. The mere fact that the recital in the plaint is false and the plaintiff was never in possession, but on the contrary strangers were in possession is not sufficient to attract Article 144 for, it might mean that there was independent trespass not connected as of right."

1. (1938) 1 M.L.J. 113 : A.I.R. 1938 Mad. 415.

In order that this decision may apply, it is necessary that there should have been a repudiation of the title of the landlord by the tenant 12 years prior to coming into force of the Act of 1963 on 1st January, 1964. In other words there should have been a denial of the right of the landlord prior to 1st January, 1952. Counsel was not in a position to place before me anything to show that there was any repudiation of the title of the landlord prior to 1st January, 1952 in the present case. Thus, there is nothing in this decision, which supports the case of the respondents before me.

11. As the present suit has been filed after the coming into force of the Limitation Act of 1963, the onus is clearly on the defendants to show that possession was adverse to the plaintiffs for a statutory period of 12 years. There is no evidence on record to show when the possession of the respondents became adverse to the plaintiff. The case of the respondents has been somewhat shifting and ambulatory. Initially the case set up in the written statement was based on title. This case has been found against by both the Courts below. In the oral evidence there are two contradictory stands *viz.*: (1) of a usufructuray mortgage; and (2) cf a purchase. For neither of these two stands is any evidence placed before the Court. The defendants would be in possession of the documentary evidence either to support the case of the usufructuary mortgage or that of purchase. The defendants have not placed any material on this point. Thus, the case of title set up in the written statement has been found against. The case of usufruturary mortgage or purchase, even assuming one has to go into it when the plea has not been taken in the written statement, has not also been established.

12. The learned counsel for the respondents drew my attention to a decision of Rajagopala Ayyangar, J., (as he then was) in *Govindaraj* v. *Kandaswami Goundar and another*[1]. It was held therein that the plaintiff could not be allowed to abandon his own case, adopt that of the defendants and claim relief on that footing. I am unable to see how this case has any application to the facts here. The plaintiffs in the present case are not seeking to abandon their case of title, which is set out in the plaint. They are not trying to take advantage of a plea taken by the defendants in the written statement. In fact, the plea taken in the written statement is compeltely contrary to the case of the plaintiffs throughout and the plaintiffs do not claim any relief based on any plea in the written statement as such. This decision, is therefore, of no assistance to the question before me.

13. As already indicated, the contention of the learned counsel for the respondents is that the title of the plaintiffs was lost by adverse possession over the statutory period prior to the Limitation Act of 1963 coming into force. On this aspect, I have already indicated, there is no evidence placed by the respondents. The learned counsel for the respondents contended that the burden of proving adverse possession cannot be thrown on the respondents. The present suit having been filed after the Limitation Act of 1963 came into force, the law enacted therein would apply to suits filed thereafter. In the case of a suit for possession based on title, the plaintiff has no longer to prove that he was in possession of the property for a period of 12 years. It is for the defendant now to establish that his possession has been adverse for the requisite period of 12 years. This has not been done in the present case. In fact, the learned counsel for the respondents is seeking to rely on the evidence of P.W.1 in which he had stated that the ancestor of defendants 1 to 8 was the Maria Arulappan, who happended to live in the suit property as a kuppa kacha kuzhi kidappukaran and that he came there under the permission of Velayudhan Narayanan in the year 1087 M.E., which corresponds to 1912. The defendants cannot seek to rely on one part of the evidence of P.W.1 *viz.*, of possession from 1087 M.E. and reject the other part *viz.*, of permission. If P.W.1's evidence as regards the starting point of the possession of the defendants' ancestors of the year 1087 is to be relied on by him, then he cannot turn round and say that at the said starting point, possession was not

1. I.L.R. (1957) Mad. 1245 ; (1956) 2 M.L.J. 578 : A.I.R. 1957 Mad. 186.

permissive and therefore, adverse. Even the case set up by the respondents' counsel before me of adverse possession, which was not in fact taken in the written statement, cannot thus be accepted.

14. The question that now remains is whether the finding of the lower appellate Court that the plaintiffs have not proved permissive possession is binding on me. When the finding is based on a wrong application of the principle of burden of proof, then the finding cannot be said to be binding. In the present case, as I have already pointed out, it is for the defendants to establish that they had perfected title by adverse possession. The learned Subordinate Judge has not chosen to refer to any evidence on the defendants' side on the question as to whether this plea has been established or not. In these circumstances, it is clear that the finding of the lower appellate Court is not binding on me.

15. For the above reasons, I hold that the defendants have not established their case of adverse possession, that the plaintiffs having proved title to the property are entitled to the possession thereof, so long as the defence has not established the plea of adverse possession and that the judgment and the decree of the trial Court have thus to be restored. I direct accordingly.

16. The second appeal is allowed with costs.

R.S. *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *T. Ramaprasada Rao and S. Maharajan, JJ.*

Bansilal Fomra and others .. *Appellants**

v.

The Thadava Co-operative Agricultural and Industrial Society Limited, having its office at Tuni, East Godavari District within the jurisdiction of the District Munsif, Tuni, East Godavari District, Andhra Pradesh .. *Respondent.*

Contract Act (IX of 1872), section 56—Contract to supply sugar—Promulgation of Sugar Control Order, 1963—Performance affected—Doctrine of frustration—Applicability.

Generally all contracts are to be interpreted literally without any interpolation in its text. But there are myriad circumstances attendant upon contracts which sometimes prompt such an interpretation of some contracts, unless the language is scrupulously plain, to read into the contract a term, which was predominantly in the minds of the parties when they formed the same. Such an intention can be gathered from the surrounding circumstances, the conditions under which the contract was entered into, the compelling dents which the law would make in them for the general good and welfare of the community, etc. If such an irresistible intention which was at the back of the mind of the parties could be gathered by a reasonable probe into the attendant circumstances governing the situation in a given case, then Courts as the authoritative interpreters of such contracts can imply a term in a contract, without unduly tinkering with it. [*Para.* 16.]

The doctrine of frustration takes into its fold not only cases of physical or literal impossibility, but also circumstances which make it impossible and illegal on the part of one of the contracting parties to perform the contract in terms agreed upon. There may be circumstances where

*Appeals Nos. 724 of 1969 and 725 of 1969 and Memo of objections in Appeal No. 724 of 1969.

20th September, 1974.

the Court may be inclined to opine that a case of literal impossibility by itself is not the sole ground for accepting the non-performance of the contract on the ground of frustration. If, in a given case, there is acceptable material to show that the events supervening after the formation of the contract have shaken the very root of it and the foundation of the contract having thus been shaken it would be impracticable to accept performance of the contract by a reasonable and prudent person, then only Courts will excuse the performance. The conclusion must be arrived at by sitting in the arm-chair of prudence and practical wisdom. *A priori* and theoretical considerations ought not to weigh while deciding whether a contract has become frustrated or not. The decision should be the dictate of commonsense, practical wisdom, and normal commercial experience. [*Para.* 22.]

Held on facts, that a major portion of the obligation as to performance of the contract had become discharged by the doctrine of frustration.

Cases referred to :—

Sannidhi Gundayya v. *Illori Subbayya*, (1926) 51 M.L.J. 663 : 99 I.C. 459 : A.I.R. 1957 Mad. 89 ; *Satyabrata Ghose* v. *Mugneeram Bangur and Company*, (1954) 1 M.L.J. (S.C.) 41 : 1954 S.C.J. 1 : 1954 S.C.R. 310 : A.I.R. 1954 S.C. 44 ; *C. K. C. Sethia* (1944) *Limited* v. *Partabmull Rameshwar*, (1950) All E.R. 51.

Appeals against the decree of the City Civil Court (2nd Assistant Judge) Madras, dated 20th December, 1967 and passed in O.S. Nos. 139 of 1966 and 3527 of 1963 respectively.

P. V. Subramanian, for Appellants.

P. V. Chalapathi Rao, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The appellants in both the appeals are the plaintiffs respectively in O.S. Nos. 139 of 1966 and 3527 of 1963 on the file of the Court of the City Civil Judge, Madras. The plaintiffs were unsuccessful in their attempt to recover damages with interest as against Thandava Co-operative Agricultural and Industrial Society Limited, Tuni in Andhra Pradesh which is a Society which was manufacturing and distributing sugar to its customers. The plaintiff in O.S. No. 139 of 1966 claims that he entered into a contract with the defendant through Messrs. Aries Sugar Agencies Limited, Madras, for the purchase of 'Tuni' Sugar, four waggons (880 bags) from the 1962-63 crops of sugar manufactured by the defendant at Rs. 106 per bag, f.o.r. Tuni. The contract was so entered into on or about 7th January, 1963 under Exhibit A-3. A sum of Rs. 4,400 was paid as earnest money by the plaintiff-appellant through Messrs. Aries Sugar Agencies Limited. According to the plaintiff, he was ready and willing to perform the contract by paying and taking delivery of the goods, that he was calling upon the defendant through Messrs. Aries Sugar Agencies Limited to perform the contract, that the defendant failed to deliver the goods and that in accordance with the main term of the contract, the defendant did not apply for or obtain an allotment to the waggons from the railway for the purpose of despatching the goods to the plaintiff. The plaintiff having waited for a reasonable time and as in any event such goods were not supplied before the first week of April, 1963, issued the suit notice Exhibit A-5 and the reply Exhibit A-6 given by the defendant not being satisfactory, has come to Court claiming damages for non-delivery of the said 880 bags at the rate of Rs. 19 per bag being the difference between the market rate and the contract rate which was reckoned on the basis of the prevailing market rate between the second week of March and first week of April, 1963.

2. Similarly, the plaintiff in O.S. No. 3527 of 1963 entered into a contract with the defendant through Messrs. Aries Sugar Agencies Limited, under the contract marked as Exhibit A-1 for the purchase of 660 bags of sugar of the 1962-63 crop at Rs. 108 per bag f.o.r. Tuni. The clause regarding despatch, which we shall consider in detail in the course of our judgment, provides that the goods have to be despatched to Royapuram as and when waggons were allotted to the defendant by the Railways. The plaintiff in this action also paid the necessary advance through Messrs. Aries Sugar Agencies Limited and was awaiting supply

till the first week of April, 1963. The defendant failed to supply the goods and did not deliver the goods as per the contract. The plaintiff accuses the defendant as not having taken diligent steps in the matter of the application and allotment of waggons by the Railways and that the defendant failed to deliver the goods within a reasonable time and in any event such supplies ought to have been made by the first week of April, 1963. Consequent upon the defendant's failure to do so and after issuing the suit notice and after having obtained a reply on the same lines of the reply notice given in the other suit, the plaintiff has come to Court claiming a sum of Rs. 11,220 as damages for non-performance of the contract, though the plaintiff was ready and willing to do his part under it, on the basis of Rs. 17 per bag being the difference between the contract rate and the market rate.

3. The defendant raised practically a common defence which we shall summarise in so far as it is relevant for our purposes. According to the defendant, the City Civil Court had no territorial jurisdiction to entertain the suit and the defendant denied that it committed any breach of contract. It referred to the Sugar Control Order of 1955 and stated that there were enough Governmental restrictions in the matter of the release and supply of goods for domestic consumption and that such inevitable delays were beyond the control of all the parties to the contract and they were bound by such delays. The defendant says that the Society and the plaintiff were not direct contracting parties *sui juris* and it was only the Madras firm of Aries Sugar Agencies Limited which brought about the contracts and which was acting as Agent of the plaintiffs, both in the matter of the formation of the contracts as well as in the manner of its execution. A bunch of contracts were entered into at about the same time when the suit contracts came into existence and Messrs. Aries Sugar Agencies Limited, expressed that such performance was to be in strict priority, that is to say, according to the numerical order of the purchase contracts. There were three sets of contracts, two of them relating to the new crop (1962-63) sugar) and the other to the old crop of which there was a small stock available with the defendant society at or about the time when Messrs. Aries Sugar Agencies Limited caused the contracts to be made. The defendant explains that the necessity for obtaining the waggons would arise only after the necessary release orders were obtained from the Governmental authorities and that the said application for waggons could only be made thereafter should be deemed to be an implied term in the contract. The defendant set out *seriatim* as to how and in what manner it secured the necessary release orders from the Government and would explain that in accordance with the instructions given by Messrs. Aries Sugar Agencies Limited, who were the prime movers of these contracts throughout, both in their formation and in the matter of their execution, it supplied according to the priority rule to the buyers of sugar strictly in conformity with the serial number of their contracts and by the time they could reach the suit contracts, the Sugar Control Order of 1963 was promulgated whereby it became impossible for the Society to respect the contracts, as under the Control Order the performance of the suit contracts became impossible or unlawful. It would refer to the Sugar Control Order of 1963, dated 17th April, 1963 and the consequential notifications issued thereunder by which all the pending contracts including the suit contracts had become completely frustrated. In those circumstances the defendant would state that at no point of time there was any breach of the conditions of the contract and that it is not in any way responsible for the non-performance of the contract. Regarding waggons, the case of the defendant is that it was possible for the Society to apply for waggons only after the release of stocks by the orders of Government and only for such number of waggons as were required for the despatch of the quantity of sugar released. The defendant claims that it has performed the contract in accordance with the strict instructions given by Messrs Aries Sugar Agencies Limited and that there was no delay or wanton avoidance on its part in the matter of the application for the waggons or getting the allotment of waggons from the Railways. It would add that the contracts contained reciprocal promises and that the plaintiff did not apply to the Society for delivery of

the goods and that the plaintiffs cannot be said to be persons who were always ready and willing to perform the contracts. In these circumstance the defendant claims that the plaintiff in both the actions are not entitled to the damages as claimed.

4. The following issues were framed for trial in O.S. No. 3527 of 1963 :

" 1. Has this Court no territorial jurisdiction to try this suit ?

2. What are the nature and terms of the suit contract ?

3. Has the defendant committed breach of contract as alleged in the plaint ?

4. Is the suit for damages maintainable where the plaintiff does not allege that he ever applied for delivery and that he was ever ready and willing to pay and perform his part of the contract ?

5. Whether the plaintiff can claim damages without any attempt by him to mitigate the alleged loss or damages?

6. Is the plaintiff entitled to any damages ? If so to what extent ?

7. To what relief is the plaintiff entitled ?

8. Is the defendant entitled to compensatory costs under section 35-A of the Civil Procedure Code ?"

Additional issues framed on 14th November 1966 :

" 1. Whether the suit contract is a contingent on conditional one and not an absolute contract ?

2. Whether performance of the contract was rendered impossible and the contract became void for the reasons mentioned in the written statement ?"

The following issues were framed in C.S. No. 139 of 1966 :

" 1. Has the defendant committed breach of the contract ?

2. Has this Court no jurisdiction to try the suit ?

3. Is the plaintiff entitled to any damages and if so to what amount ?

4. Was the suit contract conditional contract and not an absolute contract ?

5. Was there any time limit for the performance of the contract by the defendant ?

6. Was the performance of the contract rendered impossible for the reasons mentioned in para. 10 of the written statement and the other paragraphs ?

7. To what relief if any is the plaintiff entitled ?"

The defendant did not press the issue that the City Civil Court had no jurisdiction to try the suit. On the nature of the terms of the contract and so to whether the defendant committed a breach the learned Judge came to the conclusion that the contrat is not an absolute contract, but a conditional one, that the term in the contract that the goods should be despatched only after the defendant obtained release orders from the Government and thereafter only should apply for the waggons could be implied in it, that in view of the Control Orders which were in force and having regard to the manner in which the bunch of contracts should be executed strictly in accordance with the priority rule imposed by Messrs. Aries Sugar Agencies Limited there was no breach of contract on the part of the defendant and the Aries Sugar Agencies Limited acted throughout as representatives of the plaintiff s and not as indenting agents of the defendant, and that the unperformed portions of the contracts including the suit contracts became frustrated after the Sugar Control Order of 1963, was promulgated. It was in those circumstances the learned Judge held that the plaintiff was not entitled to any damages. He also held that there was no time limit for the performance of the contract. On the question whether the plaintiff would at all be entitled to damages, he held that as the plaintiff did not suffer actual damages, he is not entitled to claim damages. In the result he dismissed O.S. No. 3527 of 1963 with costs and refused to award compensatory costs in both the suits, but denied costs to the defendant in O.S. No. 139 of 1966 as both the suits were tried together. It is as against this judgment and decree that the plaintiff in each of these suits has

come up to this Court in appeal as stated above.

5. The defendant in O.S. No. 139 of 1966 has filed a cross appeal since the lower Court did not award costs to it. It is said in the memorandum of cross objections that there was no exercise of real judicial discretion when costs were disallowed by the trial Court in the connected suit.

6. Mr. P. V. Subramaniam, learned counsel for the appellants contended that the lower Court was wrong in having implied a term into the contract and holding that the obligation to apply for allotment of waggons would arise only after release of the sugar by the Governmental authorities. He would also say that Aries Sugar Agencies cannot be said to be their agent or representative and that the defendant in any event had enough stock after its performance in part of the prior contracts which were anterior in point of time to the suit contract and that it failed to despatch the goods notwithstanding such availability of stock and on this ground the defendant is bound to pay damages for non-performance of the contract at least in part as was done in the other prior contracts. He would not seriously object to the finding of the Court below that the performance of the contract in so far as it related to their unperformed portion is concerned became impossible by the promulgation of the Sugar Control Order, 1963. He would however state that there was no such frustration in the instant case. His case is that the defendant avoided to apply for waggons and get an allotment of such waggons even though it had the requisite stock with it for despatch to a few of the contracting parties in accordance with the so called priority rule and that there is no proof in the instant case that the defendant did apply for such waggons and did not get allotment within time as required under these contracts to enable it to despatch the goods at least in part performance of the contract. He would say that in so far as the plaintiff in O.S. No. 139 of 1966 is concerned, he would be entitled to damages for non-supply of at least a part of the contracted gooos and he claims such damages at the rate of Rs. 11 per bag, though, according to him, there is evidence available in the Court below that the difference between the contract rate and the market rate was decidedly more. On the other hand, Mr. P. V. Chalapathi Rau, learned counsel for the respondent, while sustaining the judgment of the Court below, urged that in commercial practice like the one with which we are concerned, an implied term could be introduced and that the defendant was obliged to apply for waggon only after release of the stock by the Government and that its course of conduct in the light of the above plea by Aries Sugar Agencies Limited throughout the bargain does not reflect any breach of the concerned contracts on its part and that it is therefore not liable for damages. He would, however, press his cross-objections in A..S. No. 724 of 1969.

7. Instead of considering the issues framed by the trial Court *seriatim* and answering them, we find it convenient to consider the contentions raised by the learned counsel before us and group the said contentions under certain decipherable heads, so that the issues between the parties could be adjudged in the light of the concerned material and evidence let in. Broadly speaking, the points for determination are:

(1) Whether Aries Sugar Agencies Limited acted as the agent of the plaintiff or only as an indenting agent ?

(2) Whether the rule of priority dictated by Aries Sugar Agencies Limited was accepted by all the buyers and was it acted upon to the knowledge of the buyers including the appellants ?

(3) Whether the defendant at all material points of time attempted to obtain release of stock from Governmental authorities ?

(4) After obtaining such release, did the defendant take all reasonable steps to despatch the goods in accordance with the contract and instruct in order of priority all the contracts which formed part of the bunch of contracts entered into by it with various buyers including the appellants through Aries Sugar Agencies Limited ?

(5) Whether the defendant at the crucial point of time attempted to get waggons for the despatch of the released stock of sugar with it, and it did not do so at least

in respect of a portion of the stock with it ?

(6) Is the defendant liable for damages for non-performance of at least a part of the contract ?

(7) Is the contract an absolute one or a contingent one ?

(8) Has the remaining portion of the unperformed part of the contract become frustrated by reason of the Sugar Control Order, 1963 ?

(9) Is the plaintiff in any of the suit entitled to damages ? If so, what is the quantum of damages ?

(10) Is the respondent in A.S. No. 724 of 1969 entitled to succeed in the cross appeal ?

8. Though there are three groups of contracts which were brought about by Aries Sugar Agencies Limited, we are practically concerned with only two groups. The second group of contracts in the seires of the activities of Aries Sugar Agencies Limited related to the purchase and sale of sugar of 1961-62 crop. It consisted of three contracts, one of which was forged by the plaintiff in O.S. No. 139 of 1966 on the file of the City Civil Court, Madras. By order, dated 15th March, 1963, under Exhibit B-41, the Government of India treated the available stock of 1961-62 crop with the defendant as 1962-63 stock for purposes of release of such stock by the Sugar Mills for purposes of domestic consumption. Thus it is evident that the 1961-62 crop sugar, which was the subject-matter of the second group of contracts, was never released at all by the Government for distribution until March, 1963. Therefore the contract Exhibit B-14, though entered into by the plaintiff in relation to the old crop, is not the subject-matter of these suits under consideration by us. There is no reference to this in the pleadings.

9. We have therefore the contract Exhibit A-3, dated 7th January, 1963 between the plaintiff in O.S. No. 139 of 1966 and the defendant for the supply of 880 bags from 1962-63 stock, which could be loaded in four waggons and the contract Exhibit A-1, dated 28th January, 1963 between the plaintiff in O.S. No. 2527 of 1963 and the defendant for the supply of 880 bags in three waggons from the new crop. It is necessary in the first instance to ascertain as to who was responsible for the formation of these contracts. Aries Sugar Agencies was a firm at Madras who was interested in bringing together the defendant as manufacturer of sugar with persons like the plaintiffs in both the suits, as the purchasers of the stock. It is abundantly clear from the correspondence and the evidence let in these cases, that Aries Sugar Agencies Limited, hereinafter referred to as Aries, initiated the commercial activity more at the instance of the plaintiff rather than the defendant. D.W. 1 examined on the side of the defendant makes this position clear. D.W. 1 says that the plaintiffs did not contact the defendant directly and Aries brought about the suit contracts and that there was no direct correspondence between the plaintiff and defendant in both the suits before the formation of the contracts. He would add that all contracts were received from Aries and that Aries sent the advances under the contract after collecting them from buyers and that they personally negotiated with the buyers. It may also be stated that this was the stand of the defendant in the pleadings. In the written statement, the defendant's case was that the defendant society and the plaintiff were not directly the contracting parties *sui juris* and that Aries conducted and managed the course of performance of the same. D.W. 1's categorical assertion on the role, of Aries was not in the least disturbed in cross-examination. Above all, the plaintiff did not care to examine Aries, a Madras firm on whom they had reposed so much of confidence and through whom they spoke and acted throughout till they came to Court. From the exhibits filed it is seen that Aries started the correspondence in December, 1962 and kept on doing so until all the contracts in the three groups were ultimately finalised. The plaintiffs chose to remain in the background and held out Aries as the catalyst and indeed as their negotiating representative or in other words as their agent. Exhibits B-67, B-68, B-69, B-60 and B-71 exchanged between 31st December, 1962 and 7th January, 1963 advert to the first group of contracts including Exhibit B-11 which is

numbered as T-11 contract (in O.S. No. 139 of 1966), Exhibits B-75 to B-79 written between 10th January, 1963 and 18th January, 1963 relate to the second group, numbered as T-12, T-13 and T-14 contracts. The prior correspondence between Aries and defendant in relation to the third group of contracts have been marked as Exhibits B-16 to B-19, exchanged during 22nd January, 1963 and 28th January, 1963 and which culminated in the suit contract Exhibit A-1 (or Exhibit B-25) numbered as T-20 contract (in O.S. No. 3527 of 1963). There is no particular reason why the plaintiffs should remain in the background throughout the relevant and material time. In fact, as we shall establish presently, the contracting parties willingly acquiesced as well in the manner of performance of the contract by Aries.

10. It was Aries who was dictating on behalf of the generality of the buyers and especially for and on behalf of the plaintiffs, as to who should be supplied first. The priority rule as to supply was the mandate of Aries. This was acquiesced in by all the buyers. The tone of correspondence also supports this view. In Exhibits B-19, B-27, B-28, B-32, B-35 and B-26, Aries brings out its real image and the significant part played by it for the plaintiffs and other buyers. It imposes on the defendant what is understood by the parties as a priority rule. The learned trial Judge has referred to those documents. In all the above exhibits it gives specific instructions as to how the defendant should execute the bunch of contracts. The buyers were aware and at least presumed to be aware of the fact that sugar had long been a Government controlled commodity under the provisions of the Sugar (Control) Order of 1955 promulgated by the Central Government under the Essential Commodities Act. The defendant rightly referred in the written statement to the following:

> "Sugar had long been a Government-controlled commodity under the provisions of the Sugar (Control) Order, 1955 promulgated by the Central Government under the powers conferred by section 3 of the Essential Commodities Act, 1955. By the force of the said Order, all sugar produced by the Society was made liable to be stored in or removable from the bonded godowns of the Society's factory in the presence of the Central Excise Inspector in charge of the Factory and the Society was not free to fulfil its contracts with buyers until and unless the Directorate of Sugar and Vanaspati, Ministry and Food and Agriculture of the Government of India issued orders of release of quantities of sugar for domestic consumption and the Society was enabled on the strength of such orders to apply for and obtain allotments of wagons for despatch of sugar to its buyers under subsisting contracts. These Governmental restrictions caused inevitable delays beyond control and both sellers and buyers were bound by such delays".

The mandates it gave in the correspondence are highly consistent with its attitude as agent of the plaintiffs. It would ask the defendant to execute the contracts belonging to the second group first before it touched upon Grade I and Grade III contracts. It wants the defendant to execute the suit contracts and the allied contracts strictly in serial order as all the buyers knew of their serial order numbers. Regarding the first and third group contracts, it says in Exhibit B-28:

> "106. *Contracts*: 'You have loaded one waggon New Crop on account of Haji Kamaludeen Saib and Company and one waggon on account of R. V. Ramia Chetty and Company'. So, now, you should load the next waggon for Ayyaswamy Nadar and the next to this for Ponnuswamy Chetty. Then contract No. ASA/T/5 should start; Likewise, please despatch according to contracts serial numbers, so that parties may not be displeased".

Then it gave encouragement to part and piecemeal performance of the contracts in *seriatim*. In Exhibit B-32 it says:

> "*Priorities*: As already requested kindly see that all orders are executed strictly in the serial order of the purchase contracts so that complaints may not emanate from parties".

In Exhibit B-35 it wires:

> "Despatch strictly according to contracts/serial numbers only".

In Exhibit B-36 it assets:

> "As already advised you, in our previous letters and also by our above telegram kindly see that the orders at Rs. 106 per bag, are executed very strictly according to the serial numbers of the buyers' contracts only, so that there may not be misunderstanding from them on our side as we now understand parties have been either writing to you or wiring you to despatch their ordered quantity. All parties are aware of their priority turns as per their numbers of their contracts."

In this letter it is further stated that the five waggons, under despatch, accordingly should be on the account of the persons mentioned in it. It would be fantastic to expect an indenting agent, as Aries is sought to be made out by the appellants, to assume the role of a representative of the buyers, if it was not authorised to do so and if it was not allowed to act as such. Thus we agree with the Court below that Aries was held out more as agent of the plaintiffs than as a bare indenting agent and the buyers also elected to accept performance of their respective contracts piecemeal, having regard to the stringent supply position of sugar, which was admittedly a controlled commodity under the Sugar (Control) Order.

11. The next relevant consideration is to see what steps did the defendant take to obtain the necessary release order from the Government so as to *bona fide* perform their part of the contract in making the supplies according to the agreed priority rule envisaged by Aries. We have already referred to the fact that the 1961-62 stock was to be treated for purposes of release, as 1962-63 stock (*vide* Exhibit B-41). With regard to 1962-63 stock, with which the present litigation is concerned, 11 contracts Exhibits B-1 to B-11 and 7 contracts Exhibits B-20 to B-26 in January/February, 1963 were entered into. The contracts bear serially a number. We are concerned with T/11 which is the suit contract in O.S. No. 139 of 1966 (in A.S. No. 724 of 1969) and Contract No. T/20 which is the subject-matter of O.S. No. 3527 of 1963 (in A.S. No. 725 of 1969). No doubt, in the second group, with which however we are not concerned, the contracts were given numbers, to wit T/12, T/13 and T/14. Thus, in accordance with the priority rule of supply and that too in part, the defendant was obliged to exhaust the first ten contracts, *i.e.*, T/1 to T/11, before it could think of performing contracts bearing numbers T/11, T/12, etc. To make such uniform supplies even in part, the defendant should have sought for release of stock from Government. Did it take reasonable steps for obtaining such order of release to respect the contracts on hand and see to the harmonious and equitable performance of all the contracts though in part and by piecemeal supply?

12. The above aspect could be well appreciated if we summarise the necessary events which led to the issuance of the release orders by the Government of India from time to time. The first release of the stock from the 1962-63 crop was under Exhibit B-15 dated 18th January, 1963. Under this order the Government directed the respondent Society to sell in India for the purpose of domestic consumption only including despatches to Nepal, Bhutan and Sikkim 45 Tonnes (Metric tonnes (450 bags) of sugar out of the production of 1962-63 and complete despatch of the aforesaid quantity of sugar by the 4th of March, 1965. As a result of such a release order, the Society applied for and obtained 2 waggons and delivered 440 bags under contracts T-1 and T-4. This is seen from Exhibits B-28 and B-89. It had therefore a net balance of 10 bags stock of released sugar with it. Thereafter, a second release was made by the Government under Exhibit B-34 dated 11th February, 1963 for 204 Metric Tonnes (2,040 bags) of sugar out of the 1962-63 production. The despatch was to be completed by 28th March, 1965. The Society promptly applied for waggons for such despatch. But, according to the evidence of D.W. 1, he could only get an allotment of 5 waggons. The result was the Society despatched 1,100 bags in 5 waggons, each waggon containing 220 bags, to each of the buyers under contracts T-2, T-5, T-6, T-7 and T-8. This is evidenced by Exhibits B-36 and B-89.

13. Immediately thereafter the Society, under Exhibit B-37 dated 4th March, 1963 applied for further release of 300 Metric Tonnes, so that it could complete the bunch of contracts which were by then pending performance with it. It repeated its request for such release under Exhibits B-38 dated 13th March, 1963. Finally, on 14th March, 1963 the Government issued the third and the final release order under Exhibits B-40 releasing 54 Tonnes (540 bags) for distribution for domestic consumption. It is therefore clear that on or about 14th March, 1963 the Society thus had a stock of 10 bags as balance under the first release order, 940 bags under the second release order and 540 bags under the third release order, totalling 1,490 bags. Out of this 1,490 bags, it is not in dispute that one Sankaralinga Nadar, who entered into the contract T-9, took delivery of 220 bags at Tuni itself and removed the same by a lorry arranged by him. Deducting the said 220 bags, the net available stock of released sugar with the Society in or about the second week of March, 1963 was 1,270 bags. To despatch these sugars in accordance with the priority rule, the Society should have secured at least 6 waggons. We may also refer to Exhibit B-42 wherein the Society again requested for a release order for about 300 Metric Tonnes, apparently the request was not complied with. But it cannot be overlooked that if the Society obtained about 5 waggons at least from the Railways in order to clear the stock of released sugar in its hands by the second week of March, 1963 it would have performed five more contracts which would take in at least contracts T-10, T-11, T-12, T-13 and T-14. We are here concerned in these appeals with T-11 to T-20. To reach contract T-20 further release orders were required. The question is whether the defendant made reasonable endeavours to secure at least 5 waggons before the control order was clamped on 17th April, 1963 making it impossible for the defendant to perform any portion of the subsisting contracts with it.

14. At this stage it is essential to weigh the bone of contention of each of the parties, which has asssumed some proportion due to the impact of law on the relative facts and situations projected in these contracts. As already observed, the parties were well aware of the difficult supply position of the essential commodity of sugar even by the manufacturer during the relevant period when the contracts were forged. The term of the contract which has bearing on this part of the case is:

"Despatching period:	Despatchable as and when waggons are allotted to you by railways as agreed".

On the bare text of this clause, Mr. P. V. Subramaniam contended that if the defendant strained every nerve to assure the waggons after performing in part contract No. T-9, it would not have been difficult for it to get the waggons allotted so as to perform at least contract No. T-11. On the other hand Mr. P. V. Chalapathi Rau urged that in the wake of the events that surrounded the formation of those contracts, an implied term can be spelt in them that waggons should only be sought for after the release orders and that such efforts were made by the defendant and therefore the defendant is not in breach to suffer damages for alleged non-performance of contract No. T-11. He would say that in so far as contract No. T-20 which is the subject-matter of O.S. No. 3527 of 1963 is concerned, it became frustrated because of the supervening imposition of the Control Order in April, 1963.

15. It is not in dispute that the Sugar Control Order, 1963 and the relevant communications were issued by the Government of India under the Essential Commodities Act in or about April, 1963. Exhibit B-91 is the copy of the notification dated 17th April, 1963 in clause 3 of which a restriction on sale of sugar by purchasers is envisaged. Under clauses 3 and 4 the sugar factory can sell as directed by the Government only to recognised dealers. It is common ground that the plaintiff in both the suits were not recognised dealers. Exhibit B-90 is a further communication dated 19th April, 1963 from the Chief Directorate of Sugar and Vanaspathi stating that the scheme for distribution of sugar will now be that the sugar

factories will supply specified quantities of sugar at the ex-factory prices in accordance with the notification in Exhibit B-91. D.W. 1 in the witness box while referring to the Sugar Control Order of 1963 says that it was so promulgated by the Central Government after a declaration of emergency due to the Chinese aggression. Soon after the promulgation of the Order, Aries, on behalf of buyers other than the plaintiffs, made efforts to adjust all the pending contracts by settling the issue and, as is seen from Exhibit B-54 and Exhibit B-56, such settlement was arrived at between the buyers unaer the various contracts excepting the plaintiffs in these two actions. It is also seen from the documentary evidence that under Exhibits B-59 and B-60 the defendant attempted to compromise the issue with the plaintiffs but was not successful. Exhibits B-62 to B-66 and B-84 to B-88 disclose that the defendant had made it clear to the plaintiffs that it was impossible for it to perform the contract after 17th April, 1963. We shall presently advert to the impossibility of performance of the unperformed portions of the contract to which practically there is no dispute by the appellants in these appeals.

16. At this stage it would be relevant to consider whether a term that waggons should be sought only after release of the sugar by the Government could be implied in the contract. Generally all contracts are to be interpreted literally without any interpolation in its text. But there are myriad circumstances attendant upon contracts which sometimes prompt the interpretation of such contracts, unless the language is scrupulously plain, to read into the contract a term, which was predominantly in the minds of parties when they formed the same. Such an intention can be gathered from the surrounding circumstances, the conditions under which the contract was entered into, the compelling dents which the law would make in them for the general good and welfare of the community, etc. If such an irresistible intention which was at the back of the mind of the parties could be gathered by reasonable probe into the attendant circumstances governing the situation in a given case, then Courts as the authoritative interpreters of such contracts can imply a term in a contract, without unduly tinkering with it.

17. Two decisions of our Courts reported in *Sannidhi Gundayya* v. *Illori Subbayya*[1] and *Satyabrata Ghose* v. *Mugneeram Bangur and Company*[2], practically cover the issue. In *Sannidhi Gundayya* v. *Illori Subbayya*[1]:

> "The defendant entered into a contract with the plaintiffs for the delivery of certain bags of rice. The contract contemplated delivery by railway waggons. As a war measure the Government had imposed 'waggon restrictions' and 'priority certificates' all over the Presidency; and the existence of those restrictions was well-known to all the parties. Owing to the shortage of waggons on account of the enforcement of the rules the defendant was not able to perform his contract. In a suit by the plaintiffs for damages for breach of contract, the defendant therefore pleaded impossibility of performance as a defence to to the suit.
>
> *Held*, that the reasonable view of the contract was that the defendant agreed to supply the promised number of bags of rice if after using his best endeavours he was able to secure the necessary number of waggons, that the obligation to perform the contract was therefore not absolute, but impliedly conditional, and that as the defendant failed to secure the waggons in spite of his best endeavours, he was not liable".

Strong reliance, however, was placed by Mr. P. V. Subramanyam on the decision of English Courts reported in *C.K.C. Sethia (1944) Limited* v. *Partabmull Rameshwar*[3]. Considering the question whether in such circumstances a term could be implied in a contract, the Court of Appeal said:

> "The Court would read an implied term into a contract only where it was clear that both parties knew that the contracts could only be met out of the sellers' quota, the question whether that

1. (1926) 51 M.L.J. 663 : 99 I.C. 459: A.I.R. 1927 Mad. 89.
2. (1954) 1 M.L.J. 41 (S.C.) : 1954 S.C.J. 1 : 1954 S.C.R. 310: A.I.R. 1954 S.C. 44.
3. (1950) 1 All E.R. 51.

quota would suffice for the purpose depended on matters concerning the conduct of the sellers' business which were peculiarly within their knowledge as opposed to that of the buyers (*e.g.*, the sellers alone would know (*a*) which year they had chosen as their basic year and what quota they were likely to receive as a result of their choice, and (*b*) what contracts with other buyers had to be satisfied out of their quota), and an unqualified provision to the effect that the contract was subject to the quota being sufficient and to the seller using his best endeavours to obtain a sufficient quota,' would be quite inadequate to secure the business efficacy of the contracts; as, therefore, the parties could not be taken to have intended that the term sought by the sellers to be implied should be incorporated in the contracts, it was impossible to read into the contracts of July and September, 1947; the term contended for by the sellers".

That case was decided on its facts. Further, as was observed by the Supreme Court in *Satyabrata Ghose* v. *Mugneeram Bangur and Company*[1]. "The decisions of the English Courts possess only a persuasive value". We are of the view that it does not lay down a general principle which is applicable to all contracts which *ex facie* present a condition for performance instead of being absolute in its tenor. In our case the specific clause contains the words "Despatchable as and when wagons are allotted to you by railways as agreed". Generally in a commercial contract such a peculiar situation is not contemplated. The parties usually give the station of destination and the station of despatch. Normally the Railways are bound, subject to availability, to allot waggons for movement of goods, which are not subject to any control or the movement of which is not regulated by any law or order. But under clause 3 (*b*) of the Sugar (Control) Order, 1955, the Central Government may even restrict or prohibit the transportation of an essential commodity like sugar. The parties were aware of this. If they do not know, *ignorantia juris non-excusat.* It is this statutory control not only in production, but also in movement, that has compelled the parties to stipulate that the goods are to be despatched after allotment of waggons. They knew that such an allotment would be made only if the sugar is released sugar. If the sugar is not released for distribution or for home consumption, it will be an offence to move the same or carry the same. Having regard to such inherent difficulties surrounding such contracts, the clause regarding despatch was introduced. We have no hesitation to hold that the contract is a contingent contract or a conditional contract and not an absolute one as contended by Mr. P V. Subramaniam. It should be held that the defendant agreed to supply the contract sugar after obtaining the release order and that his applying for the waggon was conditional upon his securing free sugar, free from control and free to move. A term that the defendant should apply for waggons after the release order is made can be implied in the suit contracts.

18. But even then the question is whether the defendant made all best endeavours to obtain the waggons. We have already referred to the principle in *Sannidhi Gundayya* v. *Illoori Subbayya*[1] and according to it, the defendant should establish that it used its best endeavours to secure the necessary number of waggons and if such proof is available it will not be liable. It follows that if such proof is not available, it would be liable. We shall refer to a few letters marked in the course of trial which have a bearing on the question. Under Exhibit B-33 Aries queries the Society and regrets that the Society did not furnish so far the registration numbers of indents to enable expeditious allotment of waggons. Under Exhibit B-81 dated 18th February, 1963 the Society replies that it has indented for 5 waggons and gave the registration number of indents and concluded that as and when waggons were allotted it shall be despatching sugar. Under Exhibit B-46 dated 28th March, 1963

1. 1954 S.C.J. 1: 1954 S.C.R. 310: (1954) 1 M.L.J. 41 (S.C.).

1. 99 I.C. 459: 51 M.L.J. 663: A.I.R. 1927 Mad. 89.

the Society writes, after obtaining the third release order for 54 tonnes, that it has indented for two more waggons and gave the indent numbers. It also confirmed that it gave a telegram reading "Release order received fifty-four tonnes indented wagons. Sending according to priority." Thereafter we do not have any follow-up correspondence to show what endeavours were made by the Society to obtain an allotment of waggons. It would not be sufficient for a seller under a conditional contract like the one under consideration, to refer to his application for indents without proving as to what steps he took to pursue the matter further to obtain an allotment of waggons. Even when D.W. 1 was in the box he was not specific on this question. After referring to the fact that it was possible for the Society to perform the contract piecemeal because of the limited release of the sugar by the Government and apparently in view of the strict instructions as to priority issued by Aries, the witness would say "we have not registered waggon in respect of the suit contracts because the time had not come for performance. We did not apply to the Railway in respect of the suit contracts". But he would add thereafter that he did not maintain any register for placing indents with the Railway and that Rs. 35 should be deposited per waggon and that he applied for waggons for despatching 940 bags. The question, therefore, is whether a mere application for indenting waggons or by paying the necessary fees which is to accompany such indents by itself would be equated to an honest *bona fide* endeavour on the part of the seller to perform the contract in accordance with its tenor. Though the contract is not absolute as is legally understood, and though it is conditional upon the allotment of waggons by the Railway, yet it is obligatory on the part of the seller to place such clinching material before the Court to show that he made all such endeavours to obtain an allotment of the waggons. In fact, no proper registers were produced and enough proof is not available to show as to how the matter was pursued by the Society in the matter of allotment of waggons. It is doubtful whether waggons were or were not allotted between 21st February, 1963 and the beginning of April, 1963. There is not even clear proof to show as to what would be the time which the Railway would take to allot waggons after the indent is made for the purpose. Even assuming that the Society did make such application by forwarding indents for waggons in or about the end of February, 1963, the Society neither examined the Railway nor produced enough data for us to assume that there was no such allotment of waggons during that period. The reasonable presumption is that at least 6 waggons could have been obtained by the defendant which were the number of waggons which were required for the despatch of the available released stock with it. If such 6 waggons should be deemed to have been allotted if particular care was taken in the matter of such allotment, then the Society ought to have performed at least contract No. T-11 which is the subject-matter of O.S. No.139 of 1966. To this extent, therefore, the Society is responsible for non-performance of the contract, even though it is a conditional one.

19. For the purpose of completing the discussion, we may also refer to the attitude of the Society in the matter of the non-performance of the contracts other than the suit contracts. D.W. 1 would say that at the intervention of Aries they adjusted several of the contracts which were contemporaneously entered into by settling the same with the buyers. He would say that a settlement was arrived at and the buyers not only got back the advance but dropped the demand for performance of the contract. He would also admit that an *ex gratia* payment was made to the parties other than the plaintiffs in this action. This is also a pointer to the fact that the Society felt guilty at one time for non-performance of the contracts. This could only be attributed to the fact that it did not take realistic steps to obtain waggons for the discharge and performance of the contracts as contemplated.

20. If, in the circumstances, it could reasonably be surmised that the Society could have obtained 6 waggons from the Railway, then it could have despatched one waggon each to 6 contracting parties. We have already referred to the fact that

up to contract No. T-9 the Society performed its part of the contract. By the reasonable assumption which we make in the instant case that 6 more waggons of sugar could have been despatched from the available released stock, the Society could have performed 6 more contracts. This takes us to contract No. T-15. As contract No. T-11 is included in that group, there has been a failure in the normal discharge of the contractual obligations by the Society in re: the plaintiff in O.S. No. 139 of 1966. To this extent, therefore, the Society is liable to pay the difference between the market price and the contract price as and towards damages. As regards the unperformed portion of the contract in T-11, beyond the supply of one waggon as above, it is frustrated as we would presently demonstrate.

21. Contract No. T-20 is the subject-matter of O.S. No. 3527 of 1963. As, in our view, the time for performance of this contract according to the priority Rule did not arise prior to 17th April, 1963 when the Sugar (Control) Order came into force, the plaintiff in this action would not be entitled to any damages as no allotment of waggons for the performance of any portion of it was possible after the Sugar (Control) Order, 1963 came into force. The plaintiff in O.S. No. 3527 of 1963, therefore, would not be entitled to any damages.

22. Before quantifying the damage to which the appellant in A.S. No. 724 of 1969 would be entitled to, we would like to touch upon the law of frustration as in force in our country. Law is well settled that the doctrine of frustration takes into its fold not only cases of physical or literal impossibility, but also circumstances which make it impossible and illegal on the part of one of the contracting parties to perform the contract in terms agreed upon. There may be circumstances where Court may be inclined to opine that a case of literal impossibility has not been established. But such literal impossibility by itself is not the sole ground for accepting the non-performance of the contract on the ground of doctrine of frustration. If in a given case there is acceptable material to show that the events supervening after the formation of the contract have shaken the very root of it and the foundation of the contract having thus been shaken it would be impracticable to accept performance of the contract by a reasonable and prudent person; then only Courts will excuse the performance. The conclusion must be arrived at by sitting in the arm chair of prudence and practical wisdom. *A priori* and theoretical consideration ought not to weigh while deciding whether a contract has become frustrated or not. The decision should be the dictate of common sense, practical wisdom and normal commercial experience. Judged by these standards, we have to accept the case of the Society that on and after 17th April, 1963 contracts as a whole have become frustrated in so far as their undischarged and unperformed portion are concerned and therefore the claim of the plaintiff for damages for alleged non-performance is opposed to section 56 of the Contract Act. Presumably because of this well-established principle Mr. P. V. Subramaniam would not pursue this aspect before us.

23. Having therefore held that a major portion of the obligation as to performance of the contract has become discharged by the doctrine of frustration, the only surviving question is as to what damages would the plaintiff in O.S. No. 139 of 1966, who is the appellant in A.S. No. 724 of 1969, be entitled to.

24. The plaintiff in O.S. No. 139 of 1966 claimed damages at the rate of Rs. 19 per bag. P.W. 1, an Accountant in a similar trade, was examined and he filed Exhibit A-7 to show the market rate of sugar at or about the time when the breach was committed. Exhibit A-8 is a purchase book filed by the same witness to show that 10 bags at the rate of Rs. 118 per bag were purchased and that the market was on the upward trend. This witness was subjected to severe cross-examination. The trend of cross-examination was that the witness was unable to say whether the subject-matter of the sale under Exhibit A-8 was equatable in all respects to the contracted sugar. We cannot, however, lightly brush aside Exhibit A-8 which shows that the market rate of sugar was Rs. 118 per

bag. The contract rate was Rs. 106 per bag. In O.S. No. 3527 of 1963 the contract rate was Rs. 108 per bag. In the memorandum of grounds of appeal the appellant restricted his claim to Rs. 11 per bag. Taking all the circumstances into consideration and in the absence of any other proof, we accept that a sum of Rs. 11 per bag appears to be the reasonable damages to which the appellant in A.S. No. 724 of 1969 would be entitled to in the circumstances. We have already found that the Society is guilty of non-performance of the contract to the extent of non-supply of 220 bags (one waggon) before the Sugar (Control) Order came into force. It therefore follows that the appellant in A.S. No. 724 of 1969 would be entitled to Rs. 2,420 with proportionate costs throughout. As the performance of the contract in O.S. No. 3527 of 1963 did not arise prior to 17th April, 1963, the appellant in A.S. No. 725 of 1969 would not be entitled to any damages. In the result, A.S. No. 724 of 1969 is allowed in part with proportionate costs throughout and A.S. No. 725 of 1969 is dismissed with costs.

25. The cross objections filed by Mr. Chalapathi Rao also deserves some consideration. We do not find any particular reason why the learned Judge could not have given costs in O.S. No. 139 of 1966. As costs always follow the event, he ought to have provided for costs and it is for this reason we have provided for proportionate costs throughout in O.S. No. 139 of 1966. Therefore the memorandum of cross objections in A.S. No. 724 of 1969 is partly allowed.

R.S. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

K. S. Ardanareeswara Gounder .. *Petitioner**

v.

Tahsildar, Bhavani and another .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), sections 115, 116—Levy of water cess—Fee or tax—Land revenue whether includes water cess—Levy whether constitutionally valid.

The term 'land revenue' has been defined under the Explanation to section 115 (1) of Madras Act XXXV of 1958 to include water cess for purposes of sections 115 and 116 of that Act. Under section 115 the levy is only on land, but the measure of tax is based on the land revenue payable on it. So long as the power to tax is there, the Legislature is entitled to adopt any measure to effectuate the levy of tax. [*Para.* 8.]

Even assuming that water cess is not land tax, it is still a revenue due on the land and, therefore, it has to be taken as land revenue. It is open to the legislature to give a special definition of land revenue for the purpose of determining the tax leviable on land under section 115 (1). The Explanation to section 115 (1) is not unconstitutional and is valid. [*Para.* 9.]

Cases referred to :

Madras Province v. *Dolours Convent*, I.L.R. (1943) Mad. 34: (1942) 2 M.L.J. 150: A.I.R. 1942 Mad. 719 ; *Balasuryaprasada Rao* v. *Secretary of State*, I.L.R. (1917) 40 Mad. 886 : 44 I.A. 166 : 33 M.L.J. 144: 41 I.C. 98: A.I.R. 1917 P.C. 42 : *H. R. S. Murthy* v. *Collector of Chittoor*, (1964) 2 S.C.J. 557 : (1964) 2 M.L.J. (S.C.) 125 : (1964) 2 An.W.R. (S.C.) 125 : (1964) 6 S.C.R. 666: A.I.R. 1965 S.C. 177; *Assistant Commissioner, Madras* v. *B. & C. Co.* (1970) 1 S.C.J. 265: (1970) 1

* W.P. No. 328 of 1972. 3rd January, 1975.

An.W.R. (S.C.) 55 : (1970) 1 M.L.J. (S.C.) 55: 75 I.T.R. 603: (1970) 1 S.C.R. 268: A.I.R. 1970 S.C. 169.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition prohibiting the respondents from taking action in pursuance of the communication Ref. No. 9703/71-A-2 dated 13th January, 1972 of 1st respondent and implementing the provisions of that part of the explanation to section 115 (1) of Tamil Nadu Act XXXV of 1958 which includes within the definition of land revenues water cess payable to the Government for water supplied or used for irrigation of land.

S. Gopalaratnam, for Petitioner.

The Government Pleader, assisted by *S. Ramalingam*, Assistant Government Pleader on behalf of Respondents.

The Court made the following

ORDER.—The petitioner owns lands in Singampatti Village, Bhavani Taluk, Coimbatore District and the lands are comprised in patta numbers 18, 30, 413 and 416. The land revenue payable for the lands comprised in the said patta numbers is Rs. 1.94, Rs. 2.93, Rs. 22.17 and Rs. 2.10 respectively and the water cess payable on them under the Madras Irrigation Cess Act, 1865 is Rs. 19.90, Rs. 32.10, Rs. 256.25 and Rs. 22.95 respectively.

2. By Government Order Ms. No. 1475, Rural Development and Local Administration, dated 1st August, 1970 the rate of levy of local cess surcharge under section 116 of the Tamil Nadu Panchayats Act, 1958 was made subject to a maximum of Rs. 1.50 on every rupee of land revenue. On the basis of the said Government Order the respondent had claimed a sum of Rs. 702.77 from the petitioner under the provisions of sections 115 and 116 of the said Act. The petitioner questions the validity of the said demand in the writ petition on the ground that the water cess collected under the Madras Irrigation Cess Act, 1865 will not come within the term "land revenue" used in sections 115 and 116 of the Tamil Nadu Act XXXV of 1958, that the Explanation to section 115 (1) which seeks to include water cess also within the term land revenue is unconstitutional and as such invalid, and that the water cess which is only a fee payable to the Government for the water supplied cannot be taken to be a tax on land, leviable under section 115 (1). The petitioner, therefore, seeks a writ of prohibition from this Court to prohibit the respondent from enforcing the said demand.

3. According to the petitioner the water cess which is levied under the provisions of the Madras Irrigation Cess Act, 1865 is only a fee and that it is not within the competence of the State Legislature to levy any tax on the consumption of water in the irrigation of land by owners thereof. It is also stated that the Explanation to section 115 (1) of Madras Act XXXV of 1958 which includes within the definition of 'land revenue' water cess payable to the Government for water supplied or used for the irrigation of land, which is not a tax, is beyond its legislative competence and is, therefore, invalid and unconstitutional.

4. The learned counsel for the petitioner refers to Entry 17 and Entry 66 of List II of the Seventh Schedule to the Constitution of India in support of his contention that no tax can be levied on the water supplied by the Government and that only a fee can be levied under Entry 66 of List II. Reference is also made to section 1 (2) of the Madras Irrigation Cess Act, 1865 as amended by Madras Act III of 1945 which declares that water cess leviable under the said Act is not a tax on land but is only a fee for the water supplied or used for the irrigation of land. It is said that in view of the said section water cess can never be treated as a tax, and that land revenue which is a tax falling under Entry 49 of List II can never be taken to include water cess which is a fee, and, therefore, it is not open to the Legislature to include water cess within the definition of land revenue.

5. The respondent, however, counters the petitioner's contention that the said Explanation is invalid and unconstitutional by saying that the State Government is

competent to define land revenue as it has done under the Explanation to section 115 (1) as including water cess, that though water cess is not treated as land tax proper for certain purposes under section 1 (2) of Madras Act VII of 1865 it is still a tax levied in respect of the land, and that water cess which is charged with reference to land in one's occupation may clearly fall within the ambit of land revenue.

6. For a proper appreciation the rival contentions of the parties it is necessary to note briefly the statutory provisions. Section 115 (1) and the Explanation thereto and section 116 of the Madras Act XXXV of 1958 are as follows:

> "There shall be levied in every Panchayat Development Block, a local cess at the rate of 45 naya paise on every rupee of land revenue payable to the Government in respect of any land for every fasli.
>
> *Explanation.*—In this section and in section 116 'land revenue' means public revenue dues on land and includes water cess payable to the Government for water supplied or used for the irrigation of land, royalty, lease amount or other sum payable to the Government in respect of land held direct from Government on lease or licence, but does not include any other cess or the surcharge payable under section 116, provided that land revenue remitted shall not be deemed to be land revenue payable for the purpose of this section."

Section 116 provides:—

> "Every Panchayat Union Council may levy on every person liable to pay land revenue to the Government in respect of any land in the panchayat union a local cess surcharge at such rate, as may be considered suitable as an addition to the local cess levied in the panchayat development block under section 115 provided that the rate of local cess surcharge so levied shall be subject to such maximum as may be prescribed"..

The maximum rate of local cess surcharge referred to in section 116 has been fixed at Rs. 1-50 on every rupee of land revenue by G.O.Ms. Nos. 1475, Rural Development and Local Administration dated 1st August, 1970. It is on the basis of the above provisions a demand has been made from the petitioner towards local cess surcharge as provided by sections 115 and 116 of Act XXXV of 1958 read with Explanation to section 115 (1). Entry 17 of List II of Schedule 7 of the Constitution runs as follows:

> "Water, that is to say water supplies, irrigation and canals, drainage and enbankments subject to the provisions of Entry 56 of List 1."

Entries 49 to 63 relate to imposition of various kinds of taxes. Entry 49 relates to taxes on lands and buildings. There is no entry enabling the State Government specifically to levy a tax on water supplied. Entry 66 of the same List reads thus:

> "Fees in respect of any of the matters in this list, but not including fees taken at any Court."

According to the petitioner water cess levied under Madras Act VII of 1865 can be justified only as a fee falling under Entry 66 of List II read with Entry 17 which corresponded to item 54 read with item 19 of List II of the Government of India Act, 1935. It is said that the position will be clear by a look at section 1 (2) of Madras Act VII of 1865 which is as follows:—

> "For the avoidance of doubt it is hereby declared that water cess leviable under this Act is not a tax on land but is a fee for the water supplied or used for the irrigation of the land".

It is with reference to the above provisions the petitioner's constitutional attack against the Explanation to section 115 (1) has to be considered.

7. In *Madras Province* v. *Dolours Convent*[1], a Division Bench of this Court ruled that a cess levied in respect of water used for irrigating land is a land tax. In that case it was contended by the owner of the lands that as under an arrangement

1. I.L.R. (1943) Mad. 34: (1942) 2 M.L.J. 150 : A.I.R. 1942 Mad. 719.

with the Government the lands are held free from land tax, a cess which is levied in respect of water used for irrigating the land being land tax it cannot, therefore, be levied on his land. The Court held, following the decision of the Privy Council in *Balasuryaprasada Rao* v. *Secretary of State*[1], that the cess payable under Madras Act VII of 1865 is a form of land tax. In the said Privy Council case, Lord Parker has held that cess collected under the said Act is leviable on land which is irrigated and therefore is in the nature of a land tax. It is with a view to get over the said decisions, section 1 (2) was introduced in Madras Act VII of 1865 by Madras Act III of 1945. The statement of objects and reasons for bringing in section 1 (2) are given as follows :

> " The Madras Irrigation Cess Act, 1865 (Madras Act VII of 1865) provides for the levy of water cess for the use of water supplied from a Government source for irrigation purposes in certain cases. In the case of lands granted tax-free under inam title deeds and permanently settled estates granted under sanads, the practice has been to charge water cess in respect of all irrigation except to the extent to which the inamdar, zamindar or landholder in virtue of any engagement with the Crown is entitled to irrigation free of separate charges. That is to say, water cess was being levied in all cases which are not covered by the first proviso to section 1 of the Act. In a recent case, the Madras High Court has held that the water cess under the Act is levied on land which is irrigated and it is therefore a form of land tax and that consequently the cess is not leviable in the case of lands held free of all land tax. The Government consider it necessary to amend the Act so as to make it clear that the water cess levied under the Act is not a tax on land, but is a fee levied for the water supplied or used for the irrigation of land. It is also considered desirable to make it quite clear that the persons referred to in the first proviso to section 1 will be liable to pay the cess or fee for all irrigation in excess of that for which under their engagement with the Crown they are entitled to water free of charge. The Government further consider it necessary to validate the long-standing practice referred to above and to indemnify the officers who have followed it hitherto."

The above extract from the objects and reasons makes it clear that water cess was taken to be a fee and not a tax on land for a specific purpose *i.e.* with reference to the lands granted tax-free under various inam title deeds and permanently settled estates granted under sanads, so as to see that the tax-free grants cannot be relied on in the matter of levy of cess for water supplied as the decisions above referred to prevented them from collecting cess for the water supplied by the Government for irrigation on the ground that it is a tax on land. Section 1 (2) cannot, therefore, be taken as conclusive on the question as to whether the water cess collected is a tax on land for other purposes.

8. Even assuming that water cess collected under Madras Act VII of 1865 is a fee, so long as section 115 (1) enabled the levy of local cess at a particular rate on every rupee of land revenue payable to the Government in respect of any land for each fasli, it is not possible to limit the meaning of the term " land revenue " by restricting it to land tax. The term ' land revenue ' has been defined under the explanation to include water cess for purposes of sections 115 and 116. Under section 115 the levy is only on land, but the measure of tax is based on the land revenue payable on it. So long as the power to tax is there, then the Legislature is entitled to adopt any measure to effectuate the levy of tax. In *H.R. S. Murthy* v. *Collector of Chittoor*[1], the Supreme Court has held that land cess imposed under the provisions of sections 78 and 79 of the Madras District Boards Act is in truth a tax on lands within entry 49 of the State list and not a tax on minerals within entry 50 of the State List and that what a lessee or licensee actually pays for the land for working the minerals on the land can be used as a measure for collecting the land cess which is nothing else but a tax on

1. I.L.R. (1917) 40 Mad. 886 : 44 I.A. 166: 33 M.L.J. 144 : 41 I.C. 98 : A.I. R. 1917 P.C. 42.

1. (1964) 2 S.C.J. 557 : (1964) 2 M.L.J. (S.C.) 125 : (1964) 2 An.W.R. (S.C.) 125 : (1964) 6 S.C.R. 666 : A.I.R. 1965 S.C. 177.

land. In *Assistant Commissioner, Madras* v. *B. & C. Co.*[1], the Supreme Court, while considering the validity of the provisions of the Madras Urban Land Tax Act of 1966 expressed the view that the mere fact that the Legislature while levying a tax under Entry 49, List II has adopted, for determining the incidence of tax, the annual or capital value of the lands and buildings will not make the legislation as one under Entry 86 of List I, and that the capital value of the asset, has been taken only as a measure for imposing the tax on lands and buildings.

9. In this case also, while levying a tax on land the aggregate of the amounts paid in respect of the land by the owner has been taken as a measure for determining the tax liability. Reference may be made in this connection to the definition of "public revenue" in the Revenue Recovery Act of 1864. Public revenue due on lands has been taken for the purpose of that Act as including cesses or other dues to the State Government on account of water supplied for irrigation. Though that definition is only for the purpose of that Act, cesses or other dues payable to the Government on account of water supplied for irrigation is normally taken as a revenue due on the land. In the light of the above discussion it is not possible to accept the petitioner's contention that the cess for the use of water supplied for irrigation purposes by the Government cannot be taken to be land revenue. The petitioner's contention is that the word "land revenue" should be equated to land tax. The word 'revenue' is in my view of a wider connotation than the word 'tax'. Even assuming that water cess is not land tax alleged by the petitioner, it is still a revenue due on the land and, therefore, it has to be taken as land revenue. As already stated, land revenue has not been specifically defined in Madras Act XXXV of 1958 except in the explanation to section 115 (1), and it is open to the Legislature to give a special definition of land revenue for the purpose of determining the tax leviable on land under section 115 (1). Hence there is no merit in the contention of the petitioner that the Explanation to section 115 (1) is unconstitutional and invalid. The writ petition is, therefore, dismissed. But in the circumstances of the case, there will be no order as to costs.

S.J. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

M. Kesava Gounder (died) and others .. *Appellants**

v.

D. C. Rajan and others .. *Respondents.*

and

Chinnammal and another *Appellants*

v.

D. C. Rajan and others .. *Respondents.*

(*A*) *Transfer of Property Act* (*IV of* 1882), *section* 14—*Rule against perpetuity—Applicability—Net income of property—Bequest in favour of male and female heirs of donee—Whether valid—Portion of bequest unenforceable—Effect.*

(*B*) *Hindu Law—Religious and Charitable Endowment—Public and Private—Distinction between.*

(*C*) *Practice—New plea in appeal—Question of construction of document—Permissibility.*

From time immorial the owner of property has a vested right inhered in him to deal with it in accordance with his discretion. Equally salient and time-honoured is the rule against perpetuity which is based on public policy which necessarily had to make certain dents on the exercise of such absolute power in case it is sought to be abused. [*Para.* 21.]

The fundamental principles engrained in the rule against perpetuity are that attempts to tie down the property and

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1. (1970) 1 S.C.J. 265 : (1970) 1 An.W.R. (S. C.) 55 : (1970) 1 M.L.J. (S.C.) 55 : 75 I.T. R. 603 : (1970) 1 S.C.R. 268 : A.I.R. 1970 S.C. 169.

* Appeal Nos. 846 of 1967 and App. No. 13 of 1968. *21st June*, 1974.

prevent the same from normal circulation, are all said to be contrivances which are void. Perpetuity has been said to be odious in law, destructive to the commonwealth, and an impediment to commerce, by preventing the wholesome circulation of property. It is in this context that public policy enters into the picture and discountenances, in equity, such dispositions the result of which is to take away from the owner the power to alienate the property or give the owner the power to create future unknown interests. The underlying principle is that restraints on alienations and the rule against remoteness being the two principles well-knit as between each other ought not to be encouraged by Courts of law, which administer not only law but also equity and good conscience. [*Para.* 22.]

Amongst Hindus, there is no marked distinction between a religious and a charitable endowment. The dichotomy, if at all, is of modern origin tempered by modern western jurisprudence. From ancient times, one endowment is telescopable into the other. In a given case whether the purpose of the grant is religious or charitable is a matter to be decided upon in accordance with Hindu notions. An endowment to be valid must be made for a purpose recognised by Hindu Law as religious or charitable. There is a distinction though fine, between public religious endowments and private religious endowments. In the former, a conferment of benefit to the public is foreseeable. But in a private Hindu religious endowment, the bounty is intended to serve the kith and kin of the author of the trust through the medium of an accepted Hindu religious endowment. In Hindu law, religious and charitable endowments are not confined to cases of public utility or benefit but cover also acquisition of religious merit. The halo, which perceivably envisages both types of endowments, is that the purpose would be one ordained by Shastras and Hindu tenets. [*Paras.* 28 *and* 29.]

To find out whether a particular disposition by a person in India is a public trust or not, it is necessary to ascertain whether the purpose of the trust is for the advancement of (1) religion, (2) knowledge, (3) commerce, (4) health, (5) safety and (6) other objects beneficial to mankind. In deciding the case on a projected hypothesis, Courts invariably bear in mind the customs, habits, traditions, the force of personal law, the sacredness of an object, which is uniformly considered as venerable by the community to which the donor belongs and such other like considerations. It is not every kind of disposition importing into it a sense of obeisance to elders, an unknown and a strange course of benefaction involving misguided bounties or a slightly, modernised but unusual concept of creating an unimaginitive religious or charitable endowment, would all come within the framework of public religious or public charitable endowments. Every such bequest should have the support of history, backing of custom or the prop of established usage. [*Para.* 30.]

Pure questions of law, though not pleaded, unless waived by the parties, can, in the discretion of the appellate Court, be permitted to be raised even at the appellate stage, provided sufficient opportunity is given to the other side and no fresh investigation or delving into facts are undertaken. If a question of law does arise on the facts, but it went unnoticed by both the parties and even so by the trial Judge, there is a legal, indeed a conscious duty on the part of the appellate Court either *suo motu* or on its attention being drawn to it to adjudge upon such a question, even though it is brought up for the first time, and no doubt, inordinate delay in the discovery of such a question by the parties may be a ground for the appellate Court to be cautious in the matter of the exercise of its discretion in favour of such a lachy litigant. [*Para.* 19.]

Cases referred to :—

Chittoori Subbanna v. *Kudappa Subbanna*, (1966) 1 M.L.J. (S.C.) 67: (1966) I An. W.R. (S.C.) 67: (1966) 1 S.C.J. 269: (1960) 2 S.C.R. 661: A.I.R. 1965 S.C. 1325; *Beresford* v. *Royal Insurance Company*, (1938) A.C. 586; *Ajit Kumar Mitra* v. *Tarubala Dasee*, (1936) I.L.R. 63 Cal. 209; *Ramchandra* v. *Shree Mahadeoji*, (1970) 2 S.C.R. 809 : A.I.R. 1970 S.C. 458; *Ram Saroop Dahji* v. *S. P. Sahi*, 1959 S.C.J. 1173 : A.I.R. 1959 S.C. 951;

Anantha v. *Nagamuthu,* (1882) I.L.R. 4 Mad. 200 ; *Parthasarathy Pillai* v. *Thiruvengada Pillai,* (1907) I.L.R. 30 Mad. 341 ; *Sri Ramanasramam* v. *Commissioner of Hindu Religious and Charitable Endowment, Madras,* (1960) 2 M.L.J. 121 : I.L.R. (1961) Mad. 922 : 73 L.W. 774 : A.I.R. 1961 Mad. 265; *Saraswathi Ammal* v. *Rajagopal Ammal,* 1953 S.C.J. 714: 1954 S.C.R. 277: (1953) 2 M.L.J. 803: A.I.R. 1953 S.C. 491 ; *Colgan* v. *Administrator-General, Madras,* (1892) I.L.R. 15 Mad. 424 ; *Year Cheap Neo* v. *Ong Cheng Neo,* L.R. 6 P.C. 381 ; *State of Uttar Pradesh* v. *Bansi Dhar,* (1974) 1 S.C.C. 446 : A.I.R. 1974 S.C. 1084.

Appeal against the decree of the Court of the Subordinate Judge, Salem in O.S. No. 146 of 1963.

S. Jagadeesan, for Appellants.

R. Vedantham, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The first defendant in O.S. No. 146 of 1963 on the file of the Additional Subordinate Judge of Salem, is the appellant in A.S. No. 846 of 1967. Defendants 3 and 4 in the said suit are the appellants in A.S. No. 13 of 1968. The first plaintiff is the brother-in-law of the first defendant (sister's husband) and the second plaintiff is the concubine of the first defendant's father. The second defendant is the first defendant's brother. The third and the fourth defendants are the alienees of some of the suit items of properties and the rest of the defendants are either alienees from the first defendant of some other items of suit properties or the tenants in occupation of one or the other items of the suit properties. The father of defendants 1 and 2 is said to be a leader of Vanniakula Kshatriya community in the village and is said to have earned a reputation of his own. He had considerable properties and under Exhibit B-1, dated 4th September, 1929 he effected a partition as between himself, the first defendant and other co-parceners of the family. It is some items of the properties which the first defendant obtained in the said partition, which are the subject-matter of a trust created by him under Exhibit A-1, dated 16th June, 1951. Under Exhibit B-2 it is said that Muthu Goundar himself executed a settlement in respect of some other properties with which we are not concerned in favour of the first defendant. It is also stated that in or about June, 1951 the first defendant has executed a gift deed of some of the properties obtained by him from his father in favour of his sister, who is the wife of the first plaintiff. Exhibit B-44 is the registration copy of the said gift-deed. On the basis of the above documents as also the oral evidence subsequently let in by the plaintiffs, it is claimed that the relationship between Muthu Goundar, the father, and the first defendant, the son, was quite cordial, when the father was alive. Having regard to the fact that his father was a prominent member of the community, the first defendant is said to have executed Exhibit A-1, which is the registered trust and settlement deed, dated 16th June, 1951. Under the said deed, the first plaintiff was constituted as the managing trustee and the second plaintiff, the first defendant and the second defendant as co-trustees. The plaintiffs claim that it was the desire of the first defendant that he should erect a statute of his father even during his life time and wanted a scheme to be drawn for its perpetual maintenance and also a contemporaneous scheme providing for the management of the properties so endowed by him. Under the deed, the trustees were authorised to collect sufficient funds for erecting the statute and out of the income from the trust properties the trustees should spend a sum of Rs. 100 per year on the birth anniversary of the said Muthu Goundar and a further sum of Rs. 100 to be paid to one Kulanthai Goundar for assisting the trustees and a provision was also made in the trust-deed for the payment of school fees for four students of the community, if they are already getting a half scholarship towards such fees from any other institution or in in the alternative for two students, if they have to be paid the full school fee. Lastly it was stated that the net income from the properties after meeting the expenses for the above specified purposes be divided in equal shares as between the two plaintiffs and the first and the second defendants. A further devise in the nature of a bequest expressly provided that with reference to the amount payable to the

second plaintiff from the net income, she should be paid the same during her life-time and afterwards, it should go to the first plaintiff. Thereafter, the respective shares so devised should be enjoyed by their respective male heirs and in the absence of such male heirs, their female heirs should divide the net income equally. Exhibit A-1, which is in Tamil, is appended hereto to this judgment for a fuller appreciation of the recitals in the deed. The above are the relevant clauses in Exhibit A-1. According to the plaintiffs, they accepted the trust and entered upon their duties and assumed possession of the suit properties and collected rents from the tenants in occupation. The case of the plaintiffs is that the first plaintiff also closed an unused well in the suit properties after spending a sum of Rs. 4,500 as that place has been decided upon for the purpose of erection of the statute of the first defendant's father. They would also state that they have placed an order for making the statute and thus made out a case that the entire trust was acted upon from the time when it was drawn up and the first and the second defendants were also parties to such acts of commission on the part of the managing trustee in the matter of the enforcement of the objects of the trust and the preservation of the trust properties. It is said that in or about the year 1955 under Exhibit A-2 dated 23rd August, 1955, the first defendant purported to cancel the trust deed Exhibit A-1 on the ground that the trust was never intended to be acted upon, nor did he ever intend to erect a statue for his father and that he signed the trust deed Exhibit A-1 at the behest and provocation of his father and the trust-deed itself is the result of the persuasion made by the plaintiffs and the influential hand they had over his father. For the above and other reasons, the first defendant is said to have cancelled the said trust deed. According to the plaintiffs the said cancellation is invalid and is void and the trust which has been accepted as "T. Muthu Goundar Memorial Trust" is an enforceable one and the purported deed of cancellation of the trust is inoperative in the eye of law and cannot be given effect to. It is also stated that the first and the second defendants have forfeited their rights to continue as trustees as they have acted against the interests of the trust. It is finally said that the alienation made by the first defendant subsequent to the cancellation of the deed of trust in favour of some of the defendants to this action including defendants 3 and 4 are invalid and cannot bind the trust. The first plaintiff as the managing trustee claims that he is entitled to possession of the suit properties which were wrongly taken away by the first defendant and that disposition of the suit properties made in 1955 is unauthorised and has to be ignored. As without possession, the trust cannot be carried out and as the unilateral cancellation of the trust deed is of no avail and as defendants 3 to 13 do not derive any valid title to parts of the suit properties alienated by the first defendant in their favour, they have come to Court for a declaration that the first plaintiff is the managing trustee of the suit properties which are to be treated as trust properties under Exhibit A-1 and for a further direction to the defendants to deliver possession of the suit properties to the first plaintiff with further mesne profits etc.

2. The first defendant in his written statement while admitting the relationship between the parties says that his father was not the elder in the community and that he was living apart from his father, since he was afraid of him. He pleads ignorance of the fact that he wanted to erect a statue of his father in the suit properties even during his life time, and drew up a scheme for the perpetual maintenance of such a statue. According to him Exhibit A-1 was forced out from him by his father, who asked him to sign some documents, which he did not understand and it was all due to the machinations of the second plaintiff as the concubine of Muthu Goundar. It is also said that the first plaintiff had also a considerable influence over his father-in-law. According to the first defendant, he was treated as a condemned man in the family and Exhibit A-1 was prepared behind his back and without his knowledge and consent. He claims that the document is vitiated by fraud and undue influence by the beneficiaries and the other trustees. He pleads ignorance as to the contents

of Exhibit A-1 and does not admit that he made any of the devises or bequests as reflected in Exhibit A-1, nor any part of the trust deed was ever acted upon or given effect to and it was never intended to be acted upon hereafter. According to him the possession of the properties always remained with him and the first plaintiff did not assume possession of the suit properties at any time under any capacity. He denies that any rents were collected by the first plaintiff along with him as trustees of the above trust and that a sum of Rs. 4,500 was spent by the first plaintiff from out of his own moneys to close the unused well. The first defendant says that it was the 12th defendant, who closed the well at his cost. It is false to say according to the first defendant, that it was decided to erect a statue of his father on the space made available after closure of the well. He would add that the body of his father was buried in a portion of survey No. 28/11, which is a part of the suit properties and a Samathi had been put up by this defendant over the place of burial as a dutiful son. No order was placed by anyone including the first plaintiff for the making of the statue as claimed. He denies that the trust deed was cancelled at the intervention of the second defendant. He says that he consciously cancelled the trust deed knowing that it could not be enforced in the eye of law, nor was it acted upon and in those circumstances, he says that the cancellation deed is valid and the the so-called trustees did not enter upon their duties as trustees, nor did they discharge any duties annexed to that office. After such cancellation, the first defendant says, he dealt with the properties as his own either leasing them out or usufructuarily mortgaging them or selling the properties at his choice. It was he who paid all the public dues on the properties and put up structures of considerable value thereon and the plaintiffs never took any objection to such dealing with the properties by the first defendant nor to the erection of superstructures which were put up openly to the knowledge of the plaintiffs. The plaintiffs were never in possession of the suit properties and the story that they were dispossessed by the first defendant only in 1955 is claimed to be false. He states that he had the power to alienate the properties in favour of the other defendants. It is also his case that so far as Survey No. 27/3, is concerned, it was porambcke property, which was assigned to him only in 1954 and it is only thereafter he could secure a right of ownership thereon. It is said that the suit is not maintainable without asking for cancellation of Exhibit A-2 and the prayers asked for are, in this sense, misconceived. The third, sixth, seventh, twelfth and the thirteenth defendants have put up constructions over the properties now in their possession pursuant to the alienations made by the first defendant from time to time and their title and possession to the same cannot be disturbed.

3. The second defendant adopts the statement of the first defendant. The third defendant as alienee claims that he is a *bona fide* purchaser for value without notice of the right of the plaintiffs and in all other respects adopts the written statement of the first defendant.

4. The fourth defendant denies the allegations in the plaint that the trust was acted upon. He, as an alienee, says that since the trust was not acted upon and it is also unenforceable, the alienations made by the first defendant in his favour and in favour of the other defendants are valid. The fourth defendant as a mortgagee of some of the suit properties has also obtained a sale of a part of it under valid registered instruments and the first plaintiff, who had at no time possession of the properties, nor exercised his office of trusteeship over the suit properties, cannot claim any right over the same or seek for the relief as asked for.

5. The fifth defendant is a tenant and says that he cannot be disturbed.

6. The sixth defendant is also a lessee and claims that he is in the property as a person, who was permitted to enter the same by one, who had the right to do.

7. So also the seventh defendant is a tenant and he claims protection from eviction.

8. Defendants 8 to 11 are also lessees of portions of the suit properties and they

adopt the written statement of the first defendant.

9. The twelfth defendant speaks to certain facts and circumstances in the family of Muthu Goundar and says that it is false to say that the first plaintiff spent a sum of Rs. 4,500 and closed the unused well. He adds that it was the first defendant, who, after getting an assignment of the land, enjoyed this unused well situated in Survey No. 27/3, and closed it at his cost. According to him Survey No. 27/3 did not belong to the family of Muthu Goundar until it was assigned in or about 1953 or 1954 and, therefore, it could not have been the subject-matter of disposition under Exhibit A-1. He is the usufructuary mortgagee over the piece of land bearing Survey No. 27/3 and claims that he spent considerable moneys for erecting shops thereon. There was no obstruction by the plaintiffs at any time when the said shops were so constructed and for these reasons, it is said that he is in possession of the properties as an alienee from the real owner of the properties and his possession, therefore, cannot be disturbed.

10. The thirteenth defendant is also a tenant and he would add that he is running a shop in survey No. 27/3 and that was leased out to him by the first defendant.

11. On these pleadings, the learned Subordinate Judge has framed the following issues:

1. Whether the suit trust deed was executed by the first defendant in the circumstances mentioned in para. 4 of the 1st defendant's written statement and if so, is it not valid ?

2. Whether suit trust deed was not acted upon ?

3. Whether the cancellation of the suit trust is valid ?

4. Whether the usufructuary mortgage deed dated 23rd October, 1958 and sale dated 7th December, 1962 in favour of the 3rd defendant are valid and binding on the trust ?

5. Whether the trustee is estopped from claiming title in respect of the properties covered by the documents dated 23rd October, 1958; by his conduct ?

6. Whether the third defendant is a *bona fide* purchaser for value?

7. Whether the improvements alleged by the 3rd defendant are true and if so, what is the value ?

8. Whether the 5th defendant is a lessee in respect of a portion of the suit property and whether the lease is binding on the suit true ?

9. Whether the alleged lease dated 25th April, 1961 for ten years in favour of the sixth defendant is valid and binding on the suit trust?

10. Whether the suit trustee is estopped from questioning the lease in favour of 6th defendant ?

11. Whether the lease for five years dated 25th April, 1961, in favour of the 7th defendant is valid and binding on the suit trust true ?

12. Whether the alleged lease in favour of 8th defendant is valid and in any event, is he entitled to continue in possession after 24th November, 1963 ?

13. Whether the leases in favour of defendants 9 to 11 and 13 are valid and binding upon the suit trust ?

14. Whether the usufructuary mortgage of 27/3 in favour of 12th defendant by the 1st defendant dated 25th September, 1961 is valid and binding on the suit trust ?

15. Whether 27/3 was not validly included in the suit trust deed ?

16. Whether the sale dated 7th July, 1958 and mortgage dated 15th March, 1962 in favour of the 4th defendant are true, valid and binding on the suit trust ?

17. Whether the suit is not properly valued for Court-fees and jurisdiction?

18. To what relief is the plaintiff entitled ?

12. On Issue No. 17, he found that the suit has been properly valued. On issues 1 to 13, the learned Subordinate Judge held that the trust deed was executed by the first defendant and it is valid and acted upon and that he had no right to execute Exhibit A-2 whereunder he purported to cancel the trust deed Exhibit A-1. He found as a fact that Exhibit A-1 was consciously and deliberately executed by the first defendant to perpetuate the memory of his father. Incidentally, after referring to the contemporaneous deeds executed as between Muthu Goundar on the one hand and other members of the family on the other, the learned Judge found that Muthu Goundar was affectionate towards the first defendant and that the theory that the first defendant was afraid of his father is not true. He also found, after scanning the evidence produced by both parties in the matter of payment of public dues and in relation to the collection of rents accrued from the suit properties etc., that Exhibit A-1 was acted upon and was given effect to and that the evidence of P.Ws. 1 to 4 cannot be disbelieved. According to him, the evidence of the witnesses examined on the side of the defendants was interested and, therefore he rejected it. He added that as there was no express reservation in Exhibit A-1 enabling the author of the trust to revoke it, the revocation of such a document is in the teeth of section 78 of the Indian Trust Act and, therefore, came to the conclusion that the deed of cancellation of the trust is not valid. Consequent upon his finding that the trust deed was valid, and enforceable, he decreed the suit as prayed for resulting in the alienations in favour of certain of the alienees being set aside and also the leases executed by the first defendant in favour of the other defendants being held to be not binding on the trust. Ultimately, he decreed the suit as prayed for. It is against this the first and the third and fourth defendants have appealed.

13. Mr. Parasaran, learned Counsel for the appellants at the outset prayed for permission to raise additional grounds in A.S. No. 846 of 1967 but based his request not on further elucidation of the facts already on record or on further evidence to be brought to our notice hereinafter, but, on pure questions of law, which arise on the pleadings and on the admitted facts noted by the learned trial Judge.

14. In C.M.P. No. 4092 of 1974 a verified petition was filed at the commencement of the argument whereunder a request is made to permit the petitioner to raise two additional grounds of appeal, namely: (1) Exhibit A-1 on its proper interpretation, violates the rule against perpetuity and the purported interest created by Exhibit A-1 is, therefore, invalid; and (2) the lower Court should have held that the tying down of the property offends the rule against perpetuity and the trust in the present case not being a public trust of a religious and charitable nature, the suit based on Exhibit A-1, is not maintainable.

15. As we said, the request to raise these additional grounds are made out only because they are pure questions of law turning on the construction of the document Exhibit A-1, but it is stated that the said questions of law do go into the root of the matter. On its own terms, Mr. Parasaran submits that Exhibit A-1 discloses that the net income from the suit properties alone has been settled on some of the named settlees and the corpus not having been disposed of, the said bequest, and the totality of the disposition as reflected in Exhibit A-1 do offend the rule against perpetuities. Further, it is said that the erection of a statue for a living person is unknown in Hindu Law and as the Supreme Court has stated in various cases that properties dedicated for the erection and maintenance of a tomb of a Hindu, cannot be said to be an endowment for a religious purpose, it is argued analogically that the erection of a statue during the lifetime of the individual and its maintenance as a memorial is also a strange concept in Hindu Law having no religious efficacy and no Sastraic precedent for the same to be upheld by Courts of Law as a religious endowment. In any event, it is stated at this stage, that considerable prejudice would be caused, if the additional grounds of appeal are not allowed to be raised.

16. The contesting respondents have filed a counter-affidavit and say that the construction of Exhibit A-1 set out in paragraph 2 of the verified petition is not tenable. According to them, the new grounds of appeal cannot be allowed to be raised at this stage. On the merits it is stated that the properties dealt with under Exhibit A-1 are not tied down as alleged in violation of the rule against perpetuity, and as such grounds were never raised in the trial Court or in the memorandum of grounds of appeal, the appellants ought not to be permitted to raise the same, as according to them, such an attempt is neither *bona fide* nor just.

17. We are of the view, that C.M.P. No. 4092 of 1974 filed in A.S. No. 846 of 1967 has to be allowed. No doubt in the written statement of the contesting defendants an unequivocal allegation has been made to the effect that the trust deed is vitiated by fraud etc. Though there is no express pleading in the first instance about the so called trust created under Exhibit A-1 being hit by the rule against perpetuity and that it is not a public trust as is popularly or ordinarily understood, it is for the Courts in such circumstances, to allow such pure questions of law to be raised so that Courts of law which are the zealous guardians of equity and good conscience may not be led astray by a strict adherence to technicalities and pleadings. If, in a given subject it is patent that pubic policy is likely to make indelible dents on it, then, the Courts themselves ought so raise the questions touching on public policy, even if none of the parties does so. No doubt public policy, which is often described as an unruly horse, should be carefully handled, lest, any improper riding of it, should take the Courts to difficult and unexplored heights and regions. Judges as the accredited expounders of the doctrine of public policy always act with precision and care to sift the material confronting them before they invoke this not—too—certain and evasive doctrine. When once it is brought to the notice of the Courts, that the language in the instrument offends certain accepted and unavoidable principles coming within the charmed circle of public policy and the pigeon holes therein, then, it would not be proper to avoid a just, strict and necessary scrutiny of the document, to see whether the questions of law raised even at the appellate stage are to be adjudged upon or not. The mere fact that such a question of law was not raised earlier in the pleadings or before the trial Court, may not always be a proper guideline to shut out a litigant from pressing into service such a question which would tilt matters and on appreciation of which real justice could effectively be rendered.

18. The Supreme Court in *Chittoori Subbanna* v. *Kudappa Subbanna*[1], by a majority judgment held that a pure question of law not dependent on the determination of any question of fact should be allowed to be raised for the first time in the grounds of appeal by the first appellate Court and such pure questions of law are allowed for the first time at later stages also.

It further held:

> "Where a new point not taken in the grounds of appeal is sought to be raised as an additional ground by a substantive application for that purpose, the High Court has discretion to allow the application or refuse it. But the discretion exercised by the High Court will not be interfered with except for good reasons, for example, where the Court acts capriciously or in disregard of any legal principle
>
> ....
>
> The omission of the appellant to raise the point before the trial Court did not amount to his waiving his right to raise the objection".

19. Thus, it is now settled that pure questions of law, though not pleaded, unless waived by parties, can in the discretion of the appellate Court, be permitted to be raised even at the appellate stage, provided sufficient opportunity is given to the other side and no fresh investigation or delving into facts are undertaken. If a question of law does arise on the facts, but it went unnoticed by both the parties and even so by the

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1. (1966) 1 M.L.J. (S.C.) 67 : (1966) 1 An.W.R. (S.C.) 67 : (1966) 1 S.C.J. 269 : (1965) 2 S.C.R. 661 : A.I.R. 1965 S.C. 1325.

trial Judge, there is a legal, indeed a conscious duty on the part of the appellate Court either *suo motu* or on its attention being drawn to it to adjudge upon such a question, even though it is brought up for the first time, and no doubt inordinate delay in the discovery of such a question by the parties may be a ground for the appellate Court to be cautious in the matter of the exercise of its discretion in favour of such a lachy litigant. The points of law that arise for consideration in the instant case are whether the terms in the so called trust deed reflected in Exhibit A-1 offend the rule against perpetuity and whether the trust is a public trust of a religious or a charitable nature. These points were not adverted to by the trial Court or even by the litigating parties. As pointed out by us earlier, the Courts themselves sometimes can raise such questions *suo motu* if such questions have a bearing on public policy. This was the view of the learned Judges in *Beresford* v. *Royal Insurance Company*[1], and obviously this recognition of the *suo motu* powers in Courts in such a situation is based on the principle that justice should not only be done but seem to be done. For all these reasons, we allow the civil miscellaneous petition C.M.P. No. 4092 of 1974.

20. Mr. Parasaran, therefore, rightly asked us to re-scrutinise Exhibit A-1 and its terms from a different perspective to find out whether the bequest or the dispositions therein offend the rule against perpetuity.

21. From time immemorial the owner of property has a vested right inhered in him to deal with it in accordance with his discretion. The right of disposition or alienation, which is co-existent with a right of ownership is so absolute that it is easy to comprehend the potential force of that right. But equally salient and time honoured is the well-known rule against perpetuity which is based on public policy which necessarily had to make certain dents on the exercise of such absolute power in case it is sought to be abused.

22. The fundamental principles engrained in the rule against perpetuity are that attempts to tie down the property and prevent the same from normal circulation, are all said to be contrivances which are void, as "the mischief that would arise to the public from estates remaining for ever, or for a long time unalienable or untransferable from one hand to another, being a damp to industry, and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered." (See Mulla on Transfer of Property Act, 6th Edition P-110). As pointed out by the learned author Jowett perpetuity has been said to be odious in law, destructive, to the common-wealth, and an impediment to commerce, by preventing the wholesome circulation of property. It is in this context that public policy enters into the picture and discountenances in equity, such dispositions the result of which is to take away from the owner the power to alienate the property or gives the owner the power to create future unknown interests. The underlying principle is that restraints in alienations, and the rule against remoteness being the two principles well knit as between each other ought not to be encouraged by Courts of law, which administer not only but also equity and good conscience. It is in this back ground, the recitals in Exhibit A-1 have to be adjudged to find whether they offend the rule against perpetuity.

23. On a *prima facie* reading of Exhibit A-1, it is clear that the first defendant has tied up the circulation of the properties and has created devises whereby certain benefits are conferred only upon certain named individuals and their heirs and thus the Course of normal inheritance is hampered with. Though, of course, Exhibit A-1 begins with a dedication for the purpose of erecting a statue for first defendant's living father and for payment of scholarship to students, yet, the other bequests therein, which are indeed separable from the above, make it clear that the dedication is not the real one but is only a devise for settling the property in perpetuity on the descendants of the donors in certain specified lines. There is no enabling clause whereby the trustees could at any time alienate the properties. At all material times the income has to be divided bet-

1. (1938) A.C. 586 at 594.

ween the plaintiffs on the one hand and defendants 1 and 2 on the other. The first defendant and his heirs do not have the right to deal with the corpus of the property. It is in this sense that the initial dedication appears to be an attempt to give a colourish garb to the entire deed and to make it operate. Mulla, in his book on Hindu Law, 13th Edition, paragraph 385, points out thus:

"(1) *Gift*: No transfer of property can operate to create an interest which is to take effect/after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

(2) *Bequest*: No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. The rule applies to private trusts also".

(*See* the decision in *Ajitkumar Mitra* v. *Tarubala Dasee*[1]). As pointed out in Halsbury's Laws of England, Third Edition, Volume 29, although the principle of private ownership requires that an owner of property shall have power to dispose as he thinks fit, either during life or on death, of his whole interest in the property he owns, yet public policy requires that the power should not be abused. Accordingly the law has from early times discouraged dispositions of property which either impose restrictions on future alienations of that property or fetter to an unreasonable extent the future devolution or enjoyment of that property.

24. The last clause in Exhibit A-1 does offend the rule against perpetuity as stated in section 14 of the Transfer of Property Act. The precedents and opinions of experts referred to above also support our conclusion that the tying up of the net income as between male and female heirs of the donees as mentioned in the last clause in Exhibit A-1 is obviously an odious clause, which is nothing but an illegal exercise of power of disposition inhered in the owner of the property. The general purpose of the disposition in the last clause in Exhibit A-1 is to tie up the corpus and create a new and an unknown line of succession as regards the net income which includes the heirs to be born male or female of the brother-in-law and the brother of the family. It is a line of descent not comprehended in Hindu Law or the Hindu Succession Act of 1956; such an innovation and purpose, motive being irrelevant in such a situation, is to be characterised as an abuse of the absolute power of disposition vested in the first defendant. Therefore, the ultimate clause in Exhibit A-1 which deals with the division of the net income as between the first plaintiff on the one hand and defendants 1 and 2 on the other and ultimately their male or female heirs, after meeting the expenses towards the other objects mentioned in the trust, without any indication as to how the corpus has to be dealt with, is certainly a fetter on the normal exercise of rights of ownership. As pointed out in Underhill's Law of Trusts and Trustees, 12th edition, page 78:

"It is against public policy that property should be settled on private trusts for an indefinite period, so as to prevent it from being freely dealt with; and, consequently, the power of so doing has been curtailed by a rule known as the rule against perpetuities..........

....

Certain trusts which at first sight appear to be public charitable trusts are in fact private trusts and thus liable to be vitiated for transgressing the rule. In particular this is so in the case of a trust for a group of persons whose common and distinguishing quality is personal relationship to a single propositus.

......................"

To a similar intent is a passage in Perry's Trusts and Trustees, 6th edition, page 624:

"In private trusts the beneficial interest is vested absolutely in some indi-

1. (1936) I.L.R. 63 Cal. 209.

> vidual or individuals who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or within the allowed limit will be competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity".

It, therefore, follows that the last clause dealing with the division of the net income as between the named individuals in existence and to be born offends the rule against perpetuities.

25. If, therefore, when a particular portion of the bequest or the disposition in Exhibit A-1 is unenforceable in the eye of law, does it follow that the entire instrument has to be ignored and the parties left to treat the properties which are the subject-matter of Exhibit A-1, as if there was no trust deed at all ?

26. At this stage, it is necessary for us to consider whether Exhibit A-1 could be considered as a private trust or as a public trust. As already pointed out by us the rule against perpetuities has to be borne in mind even while dealing with a private trust. It is also conceded by the learned counsel for the respondent that if Exhibit A-1 could be adopted as creating a private trust, then, the rule against perpetuity contained in section 14 of the Transfer of Property Act can certainly be invoked to set at naught the last bequest under Exhibit A-1.

27. The next aspect, which would arise for consideration is whether the other terms of Exhibit A-1 do project a public trust of a religious or a charitable nature. Quite intricately connected with this aspect of the case is the subject whether it is partly a private trust and partly a public trust or whether the property not having been dedicated to a trust known to Hindu Law and not being capable of being enforced as a private trust because it offends the rule against perpetuity, whether the desire of the first defendant could be carried out in any reasonable manner so as to safeguard certain bequests therein, which are charitable or claimed to be religious in nature.

28. Amongst Hindus, there is no marked distinction between a religious and a charitable endowment. The dichotomy, if at all, is of modern origin tempered by modern western jurisprudence. From ancient times, one endowment is telescopable into the other. Manu says:

> "In the Krita the prevailing virtue is declared to be in devotion, in Treta divine knowledge, in the Dwapara holy sages call sacrifice the duty chiefly performed; in the Kaili liberality alone".

Mukherjee, a famous author on Hindu Law of Religious and Charitable Trusts, in the Third Edition, of his book (page 10) says:

> "In the Hindu system there is no line of demarcation between religion and charity. On the other hand charity is regarded as part of religion. The Hindu religion recognises the existence of a life after death, and it believes in the law of karma according to which the good or bad deeds of a man produce corresponding results in the life to come. All the Hindu sages concur in holding that charitable gifts are pious acts *par excellence*, which bring appropriate rewards to the donor, and the seer in the Rigveda says in clear accents that he who gives alms goes to the highest place in heaven".

In a given case whether the purpose of the grant is religious or charitable is a matter, which is to be decided upon in accordance with Hindu notions. (See S. V. Gupte, Hindu Law, 2nd Edition page 828). An endowment to be valid must be made for a purpose recognised by Hindu law as religious or charitable. As pointed out by the Supreme Court in *Ramchandra* v. *Shree Mahadeoji*[1],

> "A trust in the sense in which it is understood in English law is unknown in the Hindu system. Hindu piety found expression in gifts to idols, to religious institutions and for all purposes considered meritorious in the

1. (1970) 2 S.C.R. 809 : A.I.R. 1970 S.C. 458.

Hindu social and religious system. Therefore, although Courts in India have for a long time adopted the technical meaning of charitable trusts and charitable purposes which the Courts in England have placed upon the term 'charity' in the Statute of Elizabeth, and, therefore, all purposes which according to English law are charitable, will be charitable under Hindu Law the Hindu concept of charity is so comprehensive that there are other purposes in addition which are recognised as charitable purposes. Hence, what are purely religious purposes and what religious purposes will be charitable purposes must be decided according to Hindu notions and Hindu Law."

Again, the Supreme Court in *Ram Saroop Dasji* v. *S. P. Sahi*[1], stated the law as follows :

"Charitable trusts are public trusts, both under the English and Indian Law; in England a religious trust being a form of charitable trust is also public, but in India, according to Hindu Law, religious trust may be public or private. But the most usual and commonest form of a private religious trust is one created for the worship of a family idol in which the public are not interested. Any other private religious trust must be very rare and difficult to think of."

As was stated in an early Madras case cited in Mulla's Hindu Law, 13th Edition, page 443:

"Where the estate created by a grant is in its nature secular, the mere fact that the motive for the grant was religious does not constitute it a religious endowment, so as to exempt it from the rule against perpetuities (See *Anantha* v. *Nagamuthu*[2].)"

29. There is a distinction, though fine, between public religious endowments and private religious endowments. In the former, a conferment of benefit to the public or a decipherable class or members of the public is foreseeable. But in a private Hindu religious endowment, the bounty is intended to serve the kith and kin of the author of the trust through the medium of an accepted Hindu religious endowment. As pointed out in *Ram Saroop Dasji* v. *S. P. Sahi*[1] a known form of private religious endowment is a grant to a family deity in which the public at large are not interested. The distinction between a public and private religious endowment has been brought out succinctly by the Supreme Court in *Ram Saroop Dasji* v. *S. P. Sahi*[1]. thus:

"The essential distinction in Hindu Law between religious endowments which are public and those which are private is that in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description; in a private trust the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust".

Examples, though not exhaustive, but illustrative may be cited.

"Bequest for sadavrats, for Dharmasalas, rest houses, for choultries, for establishment and support of schools, colleges, and universities, for dispensaries and hospitals, for the construction and maintenance of tanks, wells, and for provision of drinking water for men and animals, etc.",

have all been held to be charitable endowment, whereas gifts to idols already installed and consecrated or to be installed and consecrated and for their worship, gifts for the worship

1. 1959 S.C.J. 1173 : A.I.R. 1959 S.C. 951.
2. (1882) I.L.R. 4 Mad. 200.

1. 1959 S.C.J. 1173 : A.I.R. 1959 S.C. 951.

of God, gifts for the building of temples, gifts for religious festivals with regard to idols, and gifts to math, have all been held to be valid religious endowments. In essence, therefore, in Hindu Law, religious and charitable endowments are not confined to cases of public utility or benefit but also acquisition of religious merit is one of the criteria. The halo, which perceivably envisages both types of endowments, is that the purpose should be one ordained by Shastras and Hindu tenets.

30. After thus seeing the fine distinction between a private trust and a public trust, we shall refer to some other essential features of a public trust. If it is a public trust whether for a religious or a charitable purpose, the rule against perpetuities will not offend the same. Section 18 of the Transfer of Property Act provides as follows:

> "The restrictions is sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind".

There are certain acid tests to find out whether a particular disposition by a person in India is a public trust or not. In that context it is necessary to ascertain whether the purpose of the trust is for the advancement of (1) religion, (2) knowledge, (3) commerce, (4) health, (5) safety and (6) and other objects beneficial to mankind. In deciding the case on a projected hypothesis, Courts invariably bear in mind the customs, habits, traditions, the force of personal law, the sacredness of an object, which is uniformly considered as venerable by the community to which the donor belongs and such other like considerations. It is not every kind of disposition importing into it a sense of obeisance to elders; an unknown and a strange course of benefaction involving misguided bounties or a slightly modernised, but unusual concept of creating an unimaginative religious or charitable endowment, would all come within the framework of public religious or public charitable endowments. Every such bequest should have the support of history, backing of custom or the prop of established usage. Otherwise, it would not be easily accepted by Courts as a public religious or charitable trust or even as a private religious endowment in Hindu Law. As precedents and practice of shastraic injunctions were always held out as landmarks and guidelines for a meaningful understanding of the expression Hindu religious or charitable trusts, it is necessary to consider the intentions of texts of Hindu Law to find whether an endowment to erect a statue of a living Hindu father by a Hindu son was or has to be accepted as a public religious or a public charitable trust.

31. Mr. Parasaran, with his usual alacrity thoroughness and soundness has placed before us abundant authorities both from Shastras and judge—made law. But for such illuminating assistance given by the learned counsel, it would not have been easy for us to steer clear through the rather abstruse propositions arising for our decision in the instant case.

32. Before we deal with the merits of the case, a clear understanding as to what are the Hindu notions which ought to prevail in such matters so as to make the ultimate bounty whether of a religious or a charitable nature, a valid endowment in Hindu Law, is essential.

33. In the book, Mayne on Hindu Law and Usage, 11th Edition, page 911. the following passages are illuminating:

> "Gifts for religious and charitable purposes were impelled by the desire to acquire religious merit. They fall into two divisions, ishta and purta; the former meant sacrifices and sacrificial gifts and the latter meant charities. The former led to heaven and the latter to moksha or emancipation; charity was thus placed on a higher footing than religious ceremonies and sacrifices. Manu says: 'Let him, without tiring always offer sacrifices (ishta) and perform works of charity (purta) with faith; for offerings and charitable works made with faith and with lawfully earned money procure endless rewards. Let him always practice, according to his ability with a cheerful heart, the duty of liberality

(danadharma) both by sacrifices (ishta) and charitable work (purta) if he finds a worthy receipient for his gifts:

Ishta works are enumerated by Pandit Prannath Saraswati in his work on Endowments as: (1) Vedic sacrifices; (2) Gifts offered to priests at the same; (3) Preserving the Vedas; (4) Religious austerity; (5) Rectitude; (6) Vaisvadeva sacrifices; (7) Hospitality (atithya). Purta or charitable acts are tanks, wells with flights of steps, temples, planting of groves, the gift of food, dharmasalas (resthouses) and places for supplying drinking water, the relief of the sick, the establishment of processions for the honour of deities and so on. Gifts for the promotion of education and knowledge are specially meritorious. It will be noticed that temples and processions for deities were considered as charitable acts (purta), while hospitality (atithya) was consideerd as a sacrificial gift (ishta)".

34. In *Parthasarathy Pillai* v. *Thiruvengada Pillai*[1], Subramania Ayyar, J., in an elaborate exposition of what is ishta and purta acts, summarises the position thus:

"Ishta gifts refer to gifts at the altar in connection with sacrificial ceremonies prescribed by Hindu sacred books, and poorta gifts refer to gifts for other purposes mentioned and extolled therein".

Quoting Dr. Buhler's translation, the learned Judge continued to say:

"Let him, without tiring, always offer sacrifices (ishta) and perform works of charity (poorta) with faith."

The learned Judge also refers to the famous passages already referred to by Mayne and propounded by Saraswati. Elucidating the expression Yoga-Kshema the learned Judge quoting the Mitakshara added:

"The term Yoga-Kshema is a conjunctive compound resolvable into Yoga and Kshema. By the word Yoga is signified a cause of obtaining something not already obtained (ishta): that is, a sacrificial act be performed with fire consecrated according to the Veda and the law. By the term Kshema is denoted an auspicious act which becomes the means of conservation of what has been obtained, such as the making of a pool or a garden, or the giving of alms elsewhere than at the altar (poorta)."

1. (1907) I.L.R. 30 Mad. 341.

35. The lexicographers defined religion as action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power; the exercise or practice of rites or observances implying this. Again it is stated that religion is an out-ward act for form by which men indicate their recognition of the existence of a God or of Gods having power over their destiny, to whom obedience service and honour are due. Ramaswami, J., in *Sri Ramanasramam* v. *Commissioner Hindu Religious and Charitable Endowments Madras*[1], observed:

"As distinguished from morality, religion denotes the influences and motives to human duty which are found in the character and will of God, while morality described the duties to man, to which true religion always influences. Religions, by which are meant the modes of divine worship proper to different tribes, nations or communities, are based on the belief held in common by the members of them severally. There is no living religion without something like doctrine."

At this juncture, two important decisions, one of the Supreme Court and the other of the Privy Council may be referred to with advantage. In *Saraswathi Ammal* v. *Rajagopal Ammal*[2], the question came up whether dedicating property for any religious purpose is valid. Jagannadhadas, J., rendering the leading Judgment said:

"To the extent therefore, that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a shastraic basis so far as Hindus

1. (1960) 2 M.L.J. 121 at 126 : I.L.R. (1960) Mad. 922 : 73 L.W. 774: A.I.R. 1961 Mad. 265.

2. 1953 S.C.J. 714 : 1954 S.C.R. 276: (1953) 2 M.L.J. 803 : A.I.R. 1953 S.C. 491.

are considered. No doubt since then other religious practices and beliefs may have grown up and obtained recognition from certain classes, as constituting purposes conducive to religious merit. If such beliefs are to be accepted by Courts as being sufficient for valid perpetual dedication of property therefor without the element of actual or presumed public benefit, it must at least be shown that they have obtained wide recognition and constitute the religious practice of a substantial and large class of persons ....It cannot be maintained that the relief in this behalf of one or more individuals is sufficient to enable them to make a valid settlement permanently tying up property. The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society."

The Supreme Court, therefore, made it clear that the question whether a dedication by Hindu is for a religious purpose should be microscopically examined through the lens of a Hindu notion. What acts are productive of a religious merit or easily perceivable to be so by a Hindu or what conduces to religious merit in Hindu Law is primarily a matter guided by Shastras. Therefore, if any purpose is sought to be sustained as if it is productive of religious merit, then it must have the backing and support of Shastras or Hindu notions. The mere fact of development of certain other practices in society by passage of time cannot by themselves be a safe guide for adoption and acceptance, as practices, which are capable of producing religious merit. It should be established as a matter of fact that such religious practices have attained such importance in Hindu society and it is that universal acceptance of that act or a religious practice which could possibly be taken advantage of to sustain a bequest in a will or a settlement, so as to carve out different Hindu religious or charitable endowments.

36. The other case is the one which is reported in *Colgan* v. *Administrator General, Madras*[1], where it has been observed as follows :

"In the case of *Year Cheap Neo* v. *Ong. Cheng. Neo.*[1] a Chinese woman resident in Penang by will directed (*inter alia*) that a house termed 'Sow Chong' for performing religious ceremonies to the testatrix's deceased husband and herself should be erected. It was held by the Judicial Committee that the devise was void being in perpetuity and not for a charitable purpose. Their Lordships quote with approval the decision of the Chief Justice Sir P. Benson Maxwell in the case of *Choach Choom Nioh* v. *Spottiawoode* that whilst the English statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities was to be considered a part of it, and go on to observe : This rule which certainly has been recognised as existing in the law of England independently of any statute, is founded upon considerderations of public policy, which seem to be as applicable to the condition of such place as Penang as to England, *viz., to prevent the mischief of making property inalienable unless for objects which are useful or beneficial to the community.* 'And further on in the judgment they observe, speaking of the ceremonies to be performed in the Sow Chong House', although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage and can benefit or solace only the family itself."

37. With the above background, the clause relating to the erection of a statute and the annual expenditure of Rs. 130 on the birth—date of the father and a further bequest of Rs. 100 to one Kulandai Goundar for the assistance he was expected to render to the trustees in the maintenance of the memorial has to be considered.

38. What is strongly urged by Mr. Ramanathan, learned counsel for the respondent, is that the grant is a private trust for religious or charitable purposes and that

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1. (1892) I.L.R. 15 Mad. 424.

1. L.R. 6 P.C. 381.

the dedication is total. The deed, according to him, has to be understood as creating a power in specific individuals for performing a specific object and it has to be sustained as a valid power. It is claimed that the purpose of the trust is purta in nature or in the alternative, it is one of the Nitya Karmas or Kamya Karmas of a dutiful son. For the purpose of exhibiting objectively his veneration to his father, the first defendant has created a bounty and it is, therefore, equatable to a religious endowment in favour of a deity. The intention of this trust is sought to be supported on the theory of ancestral worship and spiritual benefit. On these lines the above clauses are sought to be sustained.

39. We have already referred to the essential ingredients in a religious and charitable endowment whether public or private. No tall claim is made that the erection of a statute by a son and endowment for its maintenance as a memorial is a public religious endowment. The reason is obvious. Muthu Goundar has not been shown to be a spiritual leader or for the matter of that, the accepted leader of the community. There is absolutely no evidence as to his credentials regarding this leadership or to his involuntary claim for veneration by the members of the public. By erecting a statute of Muthu Goundar and by providing properties for its suitable erection and maintenance, no one of the members of the public are benefited. The classified test of vesting the beneficial interest of the trust in the public is conspicuously absent. Therefore, the clauses, if they could be characterised as an endowment at all are certainly not a Hindu, public religious endowment.

40. But is it a private religious endowment ? In spite of the grand all round dimensional impact of modernisation and technocracy on the community regard to ancient precepts and respect for Hindu notions has survived and is still evoking awe and reverence in the minds of the people belonging to the Hindu community. Judged by this yardstick of living, no Court of law can accept a concept, which is strange and unknown and not even incidentally referred to in the Shastric edicts. It is said that Nitya Karma or Anushtana is at the bottom of the bequest, Surely, *Pitru Devo Bhava* is a mandate, which is deeply rooted in Hindu religion. But such an obeisance cannot be extended to illogical ends so as to achieve a purpose unknown to Hindu notions. We have already referred to what is the underlying meaning of the word religion. Mr. Ramanathan's implied suggestion is that it was in the contemplation of the first defendant to deify his father and venerate him and, therefore, it is Nitya Karma or Kamya Karma that prompted him to make the grant. But, as pointed out by the Supreme Court in *Ram Saroop Dasji* v. *S. P. Sahi*[1], apart from creating a private religious trust for the worship of an idol, any other private trust is rather quite difficult to think of. Faced with this difficulty, it is urged that it is a purta gift. Here again, there is a fallacy. Purta acts are charitable acts. There is high authority already touched upon by us to find that purta acts are weaved round a charitable vision of the author. Prannath Saraswati, Mukerjee, illustrious Judges of Courts here and elsewhere have already referred to purta acts with some significance and purpose. Any such purta act in juxtaposition to an ishta act in its ultimate analysis springs from charity. In most cases charitable acts and religious acts are interchangeable because the words are more often understood in Hindu Law as synonymous. But in our case, charity is not behind the grant nor can it be said so. The concept of charity is to be merciful and no one would describe the erection of a statue of the father by the son as a charitable or merciful act unless, of course, the father is an extraordinary being admittedly held in high esteem by the members of the public including the members of the community to which he belongs. The decision in *Gosami Sri Gridharji* v. *Romanlalji Gosami*[2], is distinguishable. There, the idol of the person created by the grant was accepted by the public as a religious head to whom veneration was due and mandatory. But here, there is no whisper in the pleadings that such was the personality of Muthu Goundar. The grant cannot be sustained on the ground of an

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1. 1959 S.C.J. 1173 : A.I.R. 1959 S.C. 951.
2. (1890) I.L.R. 17 Cal. 3.

ancestral worship. Propitiation of ancestors and a visible demonstration of obeisance to elders is certainly a respected Hindu doctrine. But such secular exhibitions in Hindu faith, though prompted by a religious motive, cannot reach unknown heights resulting in the creation of a private religious endowment by a junior member *vis-a-vis* a senior member of the family. The creation of an endowment consisting of immoveable property and a direction to spend a sizable income therefrom for the purpose of erecting a statute of the propositus and ere long respect the statue as a memorial and treat the entire trust as a memorial trust is something which is not comprehended in Hindu Law, as it is not in accordance with Hindu notions. As Jagannadhdas, J., says in *Saraswathi Ammal* v. *Rajagopal Ammal*[1], that if any purpose is to be claimed to be a perpetual dedication on the ground of religious merit, it must be shown to have a shastraic basis so far as Hindus are concerned. If as is sought to be made it is stated that for paying respect to the father or to venerate an ancestor by erecting a statue and by making an endowment for it without public benefit should be treated as a practice which is of later origin, it must at least be alleged, shown and proved that such trusts have obtained wide recognition and constitute the religious practice by a large majority of the generality of the Hindu public or the community in particular. This has not been established in this case. Again as pointed out by the Privy Council in the Chinese case cited above, to accept the clause relating to the erection and maintenance of the memorial of the father would mean to encourage the mischief of making property inalienable unless for objects which are useful or beneficial to the community. Thus, the grant and the allied clauses in Exhibit A-1 to erect a statue for the father cannot be accepted by us as a pious or charitable duty on the part of the son, in accordance with Hindu notions. It follows from the foregoing that as the first three clauses in Exhibit A-1, do not constitute a Hindu public religious endowment or a private Hindu religious endowment, the grant, therefore, in so far as this portion of Exhibit A-1 is concerned fails, as the bequests are void, unlawful and unenforceable.

1. (1964) 1 S.C.J. 271: 45 I.T.R. 229: A.I.R. 1963 S.C. 491.

41. The next question is, whether the bequest in the nature of free scholarship to two students in certain circumstances or four students in certain other circumstances, cannot be upheld. In our view, this bequest has to be up held inasmuch as it benefits the members of the public and is in the modern accepted sense a purta act as well. To impart aid in the cause of education to deserving students of the community is certainly laudable. It may be that a defined class of students are benefited but nevertheless as the body of beneficiaries is a fluctuating and uncertain one, it has to be upheld as a public charitable endowment. In fact Mr. Parasaran, does not dispute this proposition. The question is whether these clauses alone could be severed from the totality of the bounties enumerated in Exhibit A-1 and whether such a tearing of one from amongst the other void bequests is possible. If so, what is the *modus operandi* to enforce such a valid bequest is question ?

42. The Supreme Court while expatiating the doctrine of cypress observed as follows in *State of Uttar Pradesh* v. *Bansi Dhar*[1] :

> "Where the donor has determined with specificity a special object or mode for the course of his benefaction the Court cannot innovate and undo, but where a general charitable goal is projected and particular objects and modes are indicated the Court, acting to fulfil the broader benevolence of the donor and to avert the frustration of the good to the community, reconstructs, as nearly as may be, the charitable intent and makes viable what otherwise may die."

With utmost respect we adopt this reasoning to the bequest in favour of students to gain a scholarship from the estate of the first defendant. It cannot be doubted that the first defendant has specified his charitable intent and the purpose of the same is to benefit a section of the com-

1. (1974) 1 S.C.C. 446 : A.I.R. 1974 S.C. 1084.

munity. In that sense, this bequest which could stand alone has to be accepted by the Courts and given effect so. In C.A. No. 1555 of 1967, the Supreme Court after elaborately quoting the case law, reiterated the test to find out as to when a dedication may be either absolute or partial. If only the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached, to, and follows, the property which retains its original private and secular character. In a case like the one before us, we are satisfied that the first defendant solemnly intended to provide for the benefit of the students of his community. But as sandwiched this bounty is in the midst of other bequests which we have already held to be unenforceable and void. In such a case, the only possible way to give effect to the provision in Exhibit A-1 is to treat the property which is the subject-matter of the trust as alienable and partible in the ordinary way and treat the same as the property of the first defendant, as there is certainly no direct gift of any ascertainable portion of the properties mentioned in Exhibit A-1 in favour of the disposition for the giving of scholarship to students. In those circumstances, whilst we find that the properties described in Exhibit A-1 are the properties of the first defendant and they have to descend to his heirs in accordance with the normal law and in the ordinary way, the only way in which we could effectuate the partible intent of the first defendant is to state that the properties pass with the charge upon it for the purpose of respecting the above bequest.

43. In the result, therefore, we have to sustain the bequest in favour of two students who have to be paid a full scholarship and in favour of four students, if they have to be paid half scholarship for the prosecution of their studies, and that for such payment, the properties, which are the subject-matter of Exhibit A-1 are to be charged and shall stand charged.

44. The above conclusion of ours necessarily lead on to the consideration of the merits in this case.

45. The argument of Mr. Parasaran is that the trust deed has never been acted upon. We are unable to agree. The learned trial Judge after having accepted the evidence of P.Ws. 1 to 4 referred to documents such as Exhibits A-8 to A-10, A-23 and A-24 and found that Exhibit A-1 was acted upon. It is impossible to believe that the first defendant could never have joined the first plaintiff in issuing rental receipts to the tenants in occupation, if he did not accept the trust, which he sought to create under Exhibit A-1. Even public bodies like the panchayat board of the area had given notices under Exhibits A-32 and A-33 demanding arrears of property tax from the first plaintiff acting for the trust. All the above documents are before the cancellation deed Exhibit A-4. But the vague argument of Mr. Parasaran is that the statue has not been put up, that no order has been placed by the first paintiff for the purpose and no efforts have been taken to effectuate the purposes of the trust. It is one thing to say that the managing trustee was not as diligent as was expected of him ; but it is a quite different thing to argue that the trust-deed was never acted upon. No doubt Mr. Parasaran has referred to Exhibits B-7 to B-11, B-13 to B-20 as also B-34, B-49 and B-50 under which the first defendant purported to ignore the trust and alienate some of the properties for the purpose of establishing that the deed was not acted upon. These are all stray instances. Probably, there was no normal and friendly relationship between the first defendant and the first plaintiff. But that by itself will not be a safe guide to conclude that the trust deed was never intended to be acted upon. The non-payment of the sum of Rs. 100 to be paid, to Kulandai Gounder, when he was alive, and the non-payment of the scholarship to the students and the non-performance of the primary objects of the trust such as erection of a statue etc., are pressed into service. The first defendant also is equally responsible as a trustee for not having discharged his duties under Exhibit A-1. These laches could be attributed to all the trustees and not necessarily to the plaintiffs alone. Yet another circumstance relied upon is that the pattas have not been transferred

in favour of the trust and that the plaintiffs have belatedly filed this action even though theywere dispossessed according to the pleadings even in 1955. The person, who dispossessed the managing trustee so as to obtain possession of the properties of the trust is yet another trustee. We are not impressed by the argument that this is a case where the first defendant took over the property from the first plaintiff, in his capacity as absolute owner. If he dispossessed the managing trustee and took possesion of the property himself, he cannot take advantage of his own wrong and claim that the enforceable part of the benefactions in Exhibit A-1 ought to be totally ignored and that the trust-deed itself had never been acted upon or intended to be acted upon. There is varying evidence in this case as to who filed up the well. It is the case of the first plaintiff that he did it, whilst the first defendant would say that it was the 12th defendant, who expended for filing up the well and putting up the structure thereon. We are not satisfied that there is such clinching evidence in this case for us to disturb the finding of the Court below and hold that the trust was never acted upon or intended to be acted upon.

46. Even so, we are constrained to accept the finding of the learned trial judge that Exhibit A-1 was not forced down from the first defendant as alleged by him. Exhibit B-2, is a settlement deed executed in 1951 by Muthu Goundar, the father, in favour of the first defendant and Exhibit B-44 is again a doeument of gift executed by the first defendant in favour of the first plaintiff's wife. Even so, is another settlement deed executed in 1951 by the first defendant under Exhibit B-45. Excepting for the *ipse dixit* of the first defendant, who claimed that he was terribly afraid of his father and he was inimically disposed towards him and the interested testimony of D.Ws. 2 and 3, we do not find anything on record to show that the relationship between the first defendant and his father Muthu Goundar was strained. It is said that the recital in Exhibit A-1 that the first defendant conceived the idea of erecting a statute was thought of when he was 4 1/2 years old at the time when the partition in the family took place under Exhibit B-1. This recital is a too innocuous recital, which does not take anybody to any understandable heights. It is an irrelevant recital. Once we find that the mind of the first defendant was with him when he executed Exhibit A-1 then he cannot wriggle out of it by cancelling the same by executing Exhibit A-2. He had not reserved any power of cancellation either. Obviously, this was so done, when there were strained feelings between himself and the brother-in-law, the first plaintiff. Exhibit A-2 is the product of an afterthought. As in the course of our judgment we have held that the bequest in the nature of scholarship to students has to be sustained as a purta act on the part of the first defendant under Exhibit A-1, it follows that Exhibit A-2 is inoperative in the eye of law and the specific object of the trust found to be valid and enforceable still gains ground.

47. To sum up, Exhibit A-1 is a document, which has to be found as one which was executed by the first defendant with his full knowledge and that, therefore the cancellation of the same under Exhibit A-2 is invalid and unlawful. Excepting the purta act of charity in favour of the students of the community and for the payment of scholarship to them as demarcated therein which we find as the only sustainable clause, the other bequests being founded on notions unknown to Hindu Law, are invalid and unlawful. For the purpose of effectuating this purpose contained in Exhibit A-1 and as there is no absolute dedication of any demarcated property for the aforesaid purpose, whilst upholding the clause relating to the grant of scholarship to students in Exhibit A-1, we hold that the entirety of the properties in Exhibit A-1 are properties of the first defendant but charged for the aforesaid purpose. The alienees, who are the appellants in A.S. No. 13 of 1968, are, therefore, bound by this charge. The alienations by themselves and the lease-deeds in favour of the other defendants are thus upheld as valid sales, mortgages or leases effected by the owner of the properties, namely, the first defendant, subject to a charge thereon in the matter of payment of scholarship to students as provided in Exhibit A-1. This charge undoubtedly is effective from the date of this judgment and it is for the body of the

trustees named in Exhibit A-1 to implement them in a manner known to law by enforcing them as against the alienees and the lessees in possession of the properties. We therefore, hold that the third defendant is a *bona fide* purchaser for value but the properties purchased by him are subject to the charge above mentioned and that the improvements made by him are to be taken as his improvements to the property to which he is entitled in law.

48. In this view the findings of the trial Judge on issues 4, 6 and 7 are reversed.

49. Consequent upon our findings as rendered above, we find that the sale and mortgage in favour of the fourth defendant is valid and enforceable and reverse the finding of the trial Judge on issue No. 16.

50. On issues 8 to 13, we find that the first defendant is entitled to lease out the properties to defendants 5 to 13 and consequently the findings of the trial Court on these issues are reversed.

51. On issues 14 and 16, it is unnecessary for us to go into the question whether R.S. No. 27/3 was in the possession and enjoyment of the first defendant prior to the date when Exhibit A-1 was made out. As in our view, the said property should be deemed to be the property of the first defendant, it is unnecessary for us to express any further opinion on this.

52. In the result, the properties, which are the subject-matter of Exhibit A-1, are held to be the properties of the 1st defendant and the alienations by way of mortgages, sales or leases made by the first defendant in exercise of his proprietory interest over the same are held to be legal and enforceable. However, as already stated, all the aforesaid alienations are subject to a charge.

53. With these modifications, the appeal A.S. No. 846 of 1967 is partly allowed and A.S. No. 13 of 1968 is allowed, but subject to the condition that the properties in the hands of the appellants in A.S. No. 13 of 1968 stand charged in respect of the payment of scholarship to students as provided for in the relevant clause in Exhibit A-1. The parties in each of these appeals shall bear their respective costs.

R.S. ——— *Appeal allowed*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and V. Sethuraman, JJ.*

M. H. Naeems and Co., 9, Rama Pillai Street, Periamet, Madras-3.

.. *Petitioner**

v.

The State of Tamil Nadu, represented by the Joint Commercial Tax Officer, Periamet Division, Madras

.. *Respondent.*

Madras General Sales Tax Act (I of 1939), section 3 (1), Tamil Nadu General Sales Tax Act (I of 1959), section 61—Hides and Skins merchant—Unlicensed dealer—Nil assessment—Order under rule 16 (5) of the Sales Tax Rules—Rule deleted—Validity of assessment—Order can be made under section 2 (1) of the Sales Tax Act of 1939—Original assessment made by Assessment Commercial Tax Officer—Jurisdiction—Higher authority than Deputy Commercial Tax Officer—Assessment competent.

The petitioner was an unlicenced dealer in hides and skins. For the assessment year 1954-55, the Assessment Commercial Tax Officer made the assessment under rule 16 (5), of the Madras General Sales Tax Rules. The petitioner challenged the assessment on the ground that rule 16 (5) was deleted and the assessment order was invalid. The petitioner also contended that the order should have been made by the Deputy Commercial Tax Officer and the Assessment Commercial Tax Officer had no jurisdiction.

Held, though the assessment order was purported to have been made under rule 16 (5) since the original assessment authority had jurisdiction to assess and the assessee was liable to pay sales tax under section 3 (1) of the Sales Tax Act (I of 1939), the assessment order itself was valid. [*Para.* 6.]

Since the officer who originally assessed was not below the status of a Deputy Commercial Tax Officer and in fact he

* T.C. No. 134 of 1970 (Revision No. 104).
4th March, 1975.

was a higher authority, no prejudice had been caused to the petitioner in the Assessment Commercial Tax Officer himself making the assessment. The matter cannot be looked at as one involving jurisdiction as the assessing officer was not below the rank of the Deputy Commercial Tax Officer. [*Para.* 7.]

Cases referred to:—

T. M. Batcha and Company v. *State of Madras*, (1965) 16 S.T.C. 59; *The State of Madras* v. *T. M. Batcha and Company*, (1967) 20 S.T.C. 273 : (1967) 2 S.C.J. 746 : (1967) 2 M.L.J. (S.C.) 95 : (1967) 2 An. W.R. (S.C.) 95 : A.I.R. 1967 S.C. 1537; *State of Madras* v. *Noor Mohamed*, (1960) 11 S.T.C 570 : (1961) 1 S.C.R. 148 : (1961) 1 S.C.J. 301 : (1961) 1 An. W.R. (S.C.) 51 : (1961) 1 M.L.J. (S.C.) 51 : A.I.R. 1960 S.C. 1254; *Ekambara Mudaliar* v. *State of Madras*, (1973) 22 S.T.C. 591; *M. A. Noor Mohamed & Co.* v. *State of Madras*, (1956) 2 M.L.J. 374 : (1956) 7 S.T.C. 792 : A.I.R. 1957 Mad. 33.

Petition under section 38 of Act I of 1959 praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras dated 11th September, 1969 and made in T.A. No. 735 of 1962 S.M.R. No. 31 of 1961-62, dated 27th July, 1961 on the file of the Deputy Commissioner of Commercial Taxes, Madras relating to the assessment year 1954-55 (Final Assessment Order No. A-5/530/54-55 dated 28th October, 1959 on the file of the Assessment Commercial Tax Officer III, Madras City).

C. Venkataraman, for Petitioner.

The Additional Government Pleader, for Respondent.

The Judgment of the Court was delivered by

V. Ramaswami, J.—This case had a protracted career. Though the assessment relates to the year 1954-55 we had to consider the legality of the assessment as late as 1975.

2. The appellants were dealers in hides and skins carrying on the business at No. 9, Rama Pillai Street, Periamet, Madras. Originally the assessment order was made by the Assessment Commercial Tax Officer on 20th October, 1959. By this order though the gross turnover was a huge amount the net taxable turnover was determined only at Rs. 7,447-11-3 which did not attract any tax because of the pecuniary limit of Rs. 10,000 fixed at that time. The Assessment Officer had exempted the turnover relating to hides and skins on the ground that they were not licenced dealers purporting to follow the decisions of this Court in *M. A. Noor Mohamed and Company* v. *State of Madras*[1], Since the order was a "Nil" assessment order it was not communicated to the assessee. Subsequently the Supreme Court reversed the decision of this Court in *M. A. Noor Mohamed and Company* v. *State of Madras*[1], and held that unlicenced dealers in hides and skins were liable to be taxed under section 3 (1) of the Madras General Sales Tax Act, 1939. After this judgment the Deputy Commissioner, Commercial Taxes, initiated *suo motu* proceedings to revise the order of assessment under section 32 of the Madras General Sales Tax Act, 1959 which had come into force by then. He refixed the taxable turnover in his order dated 27th July, 1961 at Rs. 10,22,791-8-8 after following the prescribed procedure. The assessee then preferred an appeal to the Tribunal against this order of the Deputy Commissioner, raising various contentions.

3. One of the contentions raised was that since no order of assessment was served on the assessee and since the appeal could be filed within 30 days of the date of service of the order the time prescribed for preferring an appeal against the original assessment order had not expired and that therefore the Deputy Commissioner had no jurisdiction to revise the order. In support of this contention he relied on the decision reported in *T. M. Batcha and Company* v. *State of Madras*[2], where it had been held that if the order of assessment had not been served on the assessee, *suo motu* power of revision could not be

1. (1956) 7 S.T.C. 792 : (1956) 2 M.L.J. 374: A.I.R. 1957 Mad. 33.
2. (1965) 16 S.T.C. 59.

invoked. The Tribunal accepted this contention and allowed the appeal and set aside the order of the Deputy Commissioner. In that view the Tribunal did not go into the other contentions of the assessee on the merits. The State preferred a revision to this Court in T.C. No. 88 of 1966 and that was dismissed *in limine* following the decision in *T. M. Batcha and Company* v. *State of Madras*[1]. The State preferred a petition for leave to appeal to the Supreme Court against this order. While this petition was pending, in the Supreme Court in *The State of Madras* v. *T. M. Batcha and Company*[2], reversed the judgment of this Court in *T. M. Batcha and Company* v. *State of Madras*[1], and held that in case of nil assessment it was not obligatory on the part of the assessing authority to communicate that order to the assessee and that therefore *suo motu* revision by Deputy Commissioner was competent. After this decision of the Supreme Court the State filed another petition in this Court for review of this Court's order in T.C. No. 88 of 1966. The review petition was allowed and the order of the Tribunal was set aside following the decision of the Supreme Court in *The State of Madras* v. *T.M. Batcha and Company*[2] and the matter was remitted to the Tribunal for fresh enquiry on the merits. When the appeal was taken by the Tribunal again for consideration the assessee filed a petition for raising additional grounds in respect of the same turnover disputed by it. The Tribunal refused to entertain the additional grounds but dealt with the grounds raised by them in the original grounds of appeal. On the merits, the Tribunal held that the assessee had not proved that the disputed turnover represented export sales of hides and skins and not liable to tax. Accordingly the Tribunal confirmed the order of the Deputy Commissioner.

4. In this revision petition though the learned counsel attempted to canvass the finding of the Tribunal on merits we are unable to agree with him. As rightly pointed out by the Tribunal there is absolutely no evidence to show that the disputed turnover represented the export sales or that they were not liable to sales-tax. We therefore confirm the finding of the Tribunal that they are not proved to be export sales. But so far as the additional grounds raised by the petitioner is concerned we permitted the learned counsel for the petitioner to state the points raised by him in the additional grounds in order to find out whether there is any *prima facie* point which calls for consideration.

5. The first ground raised in the additional grounds was that the levy of tax in respect of hides and skins under rules 16 (3), 16 (4) and 16 (5) were invalid and unconstitutional. This point is covered by the Full Bench decision of this Court and it is against the contention of the petitioner and therefore there is no substance in this contention.

6. It was next contended that the original assessment order was made under rule 16 (5) and since that rule was deleted the assessment order itself became invalid. We are unable to agree with this contention of the learned counsel. Since rule 16 (5) was relied in certain cases in support of a contention that unlicenced dealers in hides and skins were not liable to sales tax, that rule was deleted. But as already noticed the Supreme Court in *The State of Madras* v. *Noor Mohamed*[1], had held that unlicenced dealers were liable to be taxed under section 3 (1) of the Madras General Sales Tax Act, 1939. Therefore though the assessment order was purported to have been made under rule 16 (5), since the original assessment authority had jurisdiction to assess and the assessee was liable to pay sales-tax under section 3 (1) the assessment order itself was valid and cannot be said to be invalid. Therefore there is no substance in this contention either.

7. The 3rd contention was that under the Madras General Sales Tax Act, 1939 the original assessment was to have been

1. (1965) 16 S.T.C. 59.
2. (1967) 2 S.C.J. 746 : (1967) 2 M.L.J. (S.C.) 95 : (1967) 2 An.W.R. (S.C.) 95 : (1967) 2 I.T.J. 670 : (1967) 20 S.T.C. 273 : A.I.R. 1967 S.C. 1537.

1. (1960) 11 S.T.C. 570 : (1961) 1 S.C.R. 148 : (1961) 1 S.C.J. 301 : (1961) 1 An.W.R. (S.C.) 51 : (1961) 1 M.L.J. (S.C.) 51 : A.I.R. 1960 S.C. 1254.

made by the Deputy Commercial Tax Officer and in the present case the original assessment order was made by the Assessment Commercial Tax Officer and that therefore that order was without jurisdiction. The Madras General Sales Tax Act, 1939 was repealed by Tamil Nadu General Sales Tax Act, 1959. But section 61 provided that in respect of the assessment years prior to 1st April, 1959 the provisions of the 1939 Act would apply. Though properly the Deputy Commercial Tax Officer could have made the assessment in this case, since the Officer who originally assessed was not below the status of a Deputy Commercial Tax Officer and in fact he was a higher authority, we do not consider any prejudice has been caused to the petitioner in the Assessment Commercial Tax Officer himself making the assessment. The matter cannot be looked at as one involving jurisdiction as the assessing officer was not below the rank of the Deputy Commercial Tax Officer. We do not therefore consider that on this ground the assessment order could be interfered with.

8. It was next contended that the *suo motu* power of revision was available to the Deputy Commissioner only under section 12 (2) in respect of the assessment years prior to 1st April, 1959 and that in purporting to invoke the power of the Deputy Commissioner under section 32 the assessee had been prejudiced. We are unable to find any difference in substance between the provisions of sections 12 (2) and 32 of the Act. The authority under both the provisions to revise the assessment is the Deputy Commissioner. The difference which the learned counsel for the petitioner wanted to rely was that while a period of 4 years is prescribed for making an order under section 12 (2) of the Act from the date of service of notice of the order sought to be revised such order will have to be made under section 32 before the expiry of 4 years from the date of order and not from the date of service of the order. We do not think that this differential limitation would in any way help the assessee in this case as the limitation prescribed under section 12 (2) was longer than the one prescribed under section 32. Therefore, the revision itself could be deemed to have been made under section 12 (2). Further the last of the two grounds is also not available to the assessee in this case in view of section 4 of Madras Act X of 1963 which validated all such defective assessments. A similar contention was also considered by this Court and rejected in *Ekambara Mudaliar* v. *State of Madras*[1]. Therefore even if the Tribunal had allowed the additional grounds to be raised we do not think that the petitioner would have been in any better position.

9. In the result the revision petition is dismissed with costs. Counsel fee Rs. 250.

S.J. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and V. Sethuraman, JJ.*

Messrs. Dugar and Co., No. 10-A, Arcot Mudali Street, Madras-17 .. *Petitioner**

v.

The State of Tamil Nadu, represented by the Joint Commercial Tax Officer, T.Nagar Division, No. 1, Boag Road, Madras-17 .. *Respondent.*

Tamil Nadu General Sales Tax Act (I of 1959), section 12 (3)—Loan on cars—Arrangement in the form of hire-purchase agreement—Whether sale—Assessing authority holding it as sale—Levy of assessment and penalty—Validity.

The petitioners were financiers advancing loans on the security of motor cars. Their customers approached them for a specific amount and they were asked to sign a sale note in favour of the petitioners purporting to sell the vehicles. Thereafter a hire purchase agreement would be taken styling the petitioners as lessors and the customers as hirers. Under this agreement, the hirers repaid the

1. (1973) 32 S.T.C. 591.

* T.C. No. 176 of 1970 and R.P. No. 119 of 1970. *12th March, 1975.*

loan in equated instalments, but the interest was immediately taken on signing the agreement. Though this hire purchase agreement was entered in the registration certificate, the certificate itself was not transferred in the name of petitioners. The assessing authority held the transaction between the petitioners and their customers as sale and levied assessment and penalty. On revision by the petitioners,

Held, it was a financial agreement and in order to secure the payment of the loan, the petitioners had obtained the sale note, the hire-purchase agreement, the promissory note and the endorsement in the registration certificate. In the circumstances, neither the assessment nor the penalty levied was sustainable.

[*Para.* 3.]

Petition under section 38 of Act I of 1959 praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, Main Branch, dated 26th August, 1969 and made in T.A. No. 2110 of 1967 (Appeal No. 340 of 1967), dated 17th July, 1967 on the file of the Appellate Assistant Commissioner (C.T.) IV, Madras) (M.G.S.T. No. 12391 of 1961-62, Order, dated 31st February, 1967 on the file of the Joint Commercial Tax Officer, T.Nagar).

C. Venkataraman, for Petitioner.

The Additional Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—In respect of the assessment year 1961-62, originally the petitioners were assessed on a turnover of Rs. 25,200 and a penalty of Rs. 2,646 was levied under section 12 (3) of the Madras General Sales Tax Act, 1959. On an appeal preferred by the petitioners, the Appellate Assistant Commissioner remanded the case for a fresh disposal. After remand, the assessing officer held that, except in respect of three transactions the petitioners had proved that the other transactions were not liable to sales tax. The three transactions which were disputed were held to be sales by the petitioners. Since they have not proved that they were second or subsequent sales, they were held to be liable for tax. The turnover of these items was determined at Rs. 8,500 and assessed at 7%. The assessing officer also levied a penalty of Rs. 892-50. This order was confirmed by the Appellate Assistant Commissioner and the Tribunal.

2. The contention of the petitioners before us and before the authorities below was that they were only financiers, that they advanced loans as against the security of motor cars, that there was no sale at all by them and that, therefore, no sales tax was payable. Before the Tribunal, the petitioners filed an affidavit setting out the details of the transactions. They have stated therein that the customers who desired to obtain loans approached the petitioners for a specific amount which were far lower than the actual value of the vehicle and that they were asked to sign a sale note in favour of the petitioners purporting to sell the vehicle. Thereafter, a hire purchase agreement would be taken styling the petitioners as lessors and the customers as the hirers. Under this agreement, hirers had to pay the loan in equated instalments. The interest payable on the loan was immediately taken on signing of the agreement and the principal alone was to be paid in instalments as provided in the agreement. The hire-purchase agreement signed by the party would then be sent to the registering authority constituted under the Motor Vehicles Act requiring that an endorsement as to the hire-purchase may be made in the registration certificate. The registration certificate itself was not transferred in the name of the petitioners, but only an endorsement would be made by the registering authority that the vehicle was under a hire-purchase agreement with the petitioners herein.

3. The Tribunal called for the registration certificate from the police department and satisfied itself that the statement of the petitioners that the registration certificate was not transferred in their name, but only an endorsement was effected to the effect that the vehicle was under a hire-purchase agreement with the petitioners was true. But the Tribunal began to consider the question as to

whether the transaction had suffered any tax already, forgetting that the transaction by the petitioners itself was not a sale at all. On the facts, which could not be disputed, and as there is no evidence to show the contrary, we have to state that the transaction was not sale at all. It was a financial agreement and in order to secure the payment of the loan, the petitioners have obtained the sale note, the hire-purchase agreement, the promissory note and the endorsement in the registration certificate. In the circumstances, therefore, neither the assessment nor the penalty levied is sustainable.

4. The petition is accordingly allowed with costs. The orders of the Tribunal and the assessing officers are set aside. Counsel's fee Rs. 250.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and V. Sethuraman, JJ.*

M/s. Orient Pharma Private Ltd. .. *Petitioner**

v.

The Government of Tamil Nadu represented by the Deputy Commercial Tax Officer, Tambaram (West) .. *Respondent.*

Tamil Nadu General Sales Tax Act (I of 1959), section 8, Item No. 3 of III Schedule —Medicinal preparations containing alcohol —Excise duty paid under Medicinal and Toilet Preparations (Excise Duties) Act, 1955, which repealed section 18-A of Madras Prohibition Act, 1937—Assessee whether entitled to exemption from sales tax.

The petitioners were manufacturers of Woodward's Gripe Water, Williams after-shave lotion, Williams Electric shaver, Metalin oral and allied products. From 1st June, 1961, the petitioner had to pay excise duty *ad valorem* on the entire quantity of goods. The petitioner claimed exemption from payment of Sales Tax under section 8 of the Tamil Nadu General Sales Tax Act, 1959 on the ground that the levy of excise duty under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 should be equated or deemed to be a levy under section 18-A of the Madras Prohibition Act, 1937 which provision was repealed by the former Central enactment.

Held, When the Tamil Nadu General Sales Tax Act, 1959, referred to the Madras Prohibition Act, 1937, in the III Schedule, it can only be a reference to the Act as it was in force on the date when the Sales Tax Act came into force. There is no possibility of reading the provision as referring to the Madras Prohibition Act as in force on any other date. Thus in item 3 of the III Schedule (to the Sales Tax Act) reference to the Prohibition Act, could not be interpreted as the Madras Prohibition Act, 1937 as was in force prior to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. [*Para.* 20.]

The medicinal and toilet preparations manufactured by the petitioners were not entitled to the exemption under section 8 of the Sales Tax Act. [*Para.* 22.]

Case referred to:—

State of Punjab v. *Sukh Dev Sarup Gupta*, (1970) 26 S.T.C. 303 : (1971) 1 S.C.R. 442 : (1971) 1 S.C.J. 543 : A.I.R. 1970 S.C. 1641.

Petitions under section 38 of the Tamil Nadu General Sales Tax Act, 1959, praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Main Branch, dated 28th October, 1971 and made in T.A. Nos. 509 of 1970, 508 of 1970, 510 of 1970, 511 of 1970 respectively (Appeal Nos. 5621 of 1969, dated 13th February, 1970 on the file of the Appellate Assistant Commissioner (Commercial Taxes) V, Madras City, (MGST No. 4814 of 1965-66 and 64-65 order, dated 14th January, 1967 and 28th February, 1966 on the file of the Deputy Commercial Tax Officer, Saidapet (South), Alandur) in T.C. Nos. 65 and 68 of 1973 and MGST No. 60422 of 1966-67 and 67-68, dated 3rd December, 1967 and 15th

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* T.C. Nos. 65, 68, 69 and 71 of 1973 and Revision Nos. 48, 51, 52 and 54 of 1973.
10th April, 1975.

March, 1969 on the file of the Deputy Commercial Tax Officer, Tambaram, in T.C. Nos. 69 and 71 of 1973.

V. K. Thiruvenkatachari for *A. N. Rangaswamy* and *B. S. Satyanrayanan*, for Petitioner.

The Additional Government Pleader, for Respondent.

The Order of the Court was made by

Ramaswami, J.—The petitioners in these cases are the manufacturers of Woodward's Gripe Water, Williams After Shave Lotion, Williams Electric Shave, Metalin Oral and allied products. They are carrying on business in the State of Tamil Nadu. For the Assessment years 1961-62 to 1967-68, they submitted their returns under the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as the Sales Tax Act). They had collected the tax payable on the taxable turnover. Their returns were accepted and assessment orders were made on various dates.

2. Prior to 1st June, 1961, the excise duty on medicinal and toilet preparations was levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 on only the alcoholic contents of the preparations. But, with effect from 1st June, 1961 by a Government Notification, the Excise Duty became payable *ad valorem* on the entire quantity of the goods and not merely on the alcoholic contents. On 12th July, 1968, on an appeal preferred by one Messrs. T.T. Krishnamachari & Company, who were dealers, among others, in Woodward's Gripe Water, the Appellate Assistant Commissioner, Madras, took the view, purporting to rely on an earlier order of the Tribunal, that by virtue of section 8 of the General Clauses Act, 1897, any excise duty levied or leviable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, should be equated to an excise duty levied or leviable under section 18-A of the Madras Prohibition Act, 1937. In that view, he held that the turnover relating to the sale of Woodward's Gripe Water, in respect of which excise duty had been paid under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, were entitled for exemption under section 8 read with item 3 of the III Schedule to the Sales Tax Act.

3. On 31st December, 1968, the petitioners filed two petitions before the Deputy Commercial Tax Officer, Tambaram, who was the Assessing Authority, for refund of the tax paid by them in respect of the Assessment Years 1961-62 to 1967-68. In these petitions, they claimed that the products sold by them contained alcohol and were exempt from tax. Under section 8 read with item 3 of the III Schedule to the Sales Tax Act and they have been submitting their returns in respect of the sale of these goods and paying the sales tax as they were not aware, at that time, that the goods were exempt under the said provision. They also claimed that they came to know of the correct legal position only in January, 1968. It was further submitted by them that since the payments were made on a mistake of law, the Government cannot appropriate the amounts and that they were entitled for refund of the tax paid. They also relied on the decision of the Appellate Assistant Commissioner, in the case of Messrs. T. T. Krishnamachari & Company.

4. The Assessing Officer rejected these petitions. The appeals filed by the petitioners were also dismissed by the Appellate Assistant Commissioner, as filed out of time, on a mistaken impression that the appeals were against the original assessment orders themselves.

5. On a further appeal, since there is no provision in the Sales Tax Act, or the Rules framed thereunder, for refund of sales-tax assessed and collected, the Tribunal treated these petitions as filed under section 55 of the Sales Tax Act for rectification of the Assessment Orders. The petitions relating to the Assessment Years 1961-62 to 1963-64 were dismissed by the Tribunal as filed beyond the period of limitation prescribed under section 55. In respect of the petitions relating to the Assessment Years 1964-65 to 1966-67, the Tribunal held that there was no error or mistake of law apparent on the face of the record, which could have been rectified under section 55 and in that view, dismissed those petitions as well.

6. These four Tax Revision Cases related to the rectification petitions for the Assessment Years 1964-65 to 1966-67, which were dismissed on the ground that there was no error or mistake of law apparent on the face of the records.

7. Under section 8, read with item 3 of the III Schedule to the Sales Tax Act, a dealer who deals in "any goods on which duty is levied or leviable under the Madras Prohibition Act, 1937 on the entire quantity of such goods and not merely on any ingredient which forms part of such goods" shall not be liable to pay any tax in respect of such goods. The Tribunal dealt with the question as if the goods were exempt under this provision and proceeded to consider whether the provisions of section are attracted and held, as already stated, that there was no error, or mistake of law on the face of the record, which could be rectified under that provision.

8. But, in these petitions, the learned Government Pleader contended that the goods were not at all exempt under section 8 read with item 3 of the III Schedule and they were correctly assessed. It has, therefore, become necessary to deal with the question as to whether these goods were exempt at all.

9. The argument of the learned counsel for the petitioners was that Woodward's Gripe Water, Williams After Shave Lotion Williams Electric Shave Metalin Oral and allied products manufactured by the petitioners were 'liquor' within the meaning of the Madras Prohibition Act, 1937. The excise duty on the manufacture of these goods was levied and leviable under section 18-A of the Madras Prohibition Act, 1937. On and from 1st April, 1957, such duty is levied or leviable under the Medicinal and Toilet Preparations (Excise Duty) Act, 1955, which repealed section 18-A and re-enacted that provision as a levy under a Central Act. Therefore, by virtue of section 8 of the General Clauses Act, 1897, any reference made to the excise duty levied or leviable under the Madras Prohibition Act, 1937, in the Sales Tax Act, shall be construed as a reference to the correspoding provision re-enacted under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. In other words, according to the learned counsel, any excise duty levied, or leviable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, shall be deemed to have been levied or leviable under the Madras Prohibition Act, 1937.

10. *Per contra*, the learned Government Pleader contended that the Sales Tax Act was enacted and came into force in 1959, long after the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. But, there was no reference to this Central Act in item 3 of the III Schedule. On the other hand, the entry referred to only the duty levied or leviable under the Madras Prohibition Act, 1937. In the absence of any specific exemption of goods on which the duty is levied, or leviable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the petitioners are not entitled to ask for exemption.

11. We are proceeding to consider these rival contentions on the assumption that the goods manufactured by the petitioners contained alcohol and, therefore, satisfied the definition of 'liquor' under the Madras Prohibition Act, 1937. But, we want to make it clear that the learned Government Pleader did not concede this point, though the Tribunal also proceeded on the basis that these goods satisfied the definition of 'liquor' under the Prohibition Act, 1937. If these preparations were 'liquor' within the meaning of that definition, the excise duty should have been levied under section 18-A of the Madras Prohibition Act, 1937, in respect of the manufacture of these goods.

12. Item 40 of List II in the VII Schedule to the Government of India Act, 1935, conferred legislative power on the State Legislatures to levy duties of excise on medicinal and toilet preparations containing alcohol, manufactured or produced in the State. In exercise of this power, many State Legislatures had, prior to the Constitution, enacted laws imposing excise duty on these goods. Some States had enacted separate laws on Excise and some others had made these levies as part of their Prohibition Acts.

13. So far as the State of Tamil Nadu is concerned, section 18-A was inserted by Madras Act XIX of 1948 in the Madras Prohibition Act, 1937 authorising levy of excise duty. The relevant portion of this section reads as follows :

> " An excise duty or countervailing duty of such amount as the State Government may, by notification in the *Fort St. George Gazette*, specify from time to time shall, if they so direct, be levied on all liquors and intoxicating drugs permitted to be imported, exported, transported, manufactured, issued from any manufactory or institution or sold, under the provisions of this Act or any rule, notification, licence or permit issued thereunder."

14. Under the Constitution, the duties of excise on medicinal and toilet preparations containing alcohol manufactured or produced in India had now been made a Central subject. But, Article 277 provided that any duties which immediately before the commencement of the Constitution were being lawfully levied by the Government of any State, notwithstanding that those duties are now mentioned in the Union List, may be continued, to be levied until provision to the contrary is made by Parliament by law. Thus, until Parliament made any law relating to the Medicinal and Toilet Preparations, the States were permitted to continue the levies of excise on such preparations which they were levying immediately before the commencement of the Constitution. In order to secure uniformity in the rates of excise duty and for uniform procedure for collection therefor, in exercise of its legislative power under the Constitution, the Parliament enacted the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Section 21 of this Act which repealed the corresponding provisions in the State Acts reads as follows :

> " 21. *Repeals and savings* If, immediately before the commencement of this Act there is in force in any State any law corresponding to this Act, that law is hereby repealed :
>
> Provided that all rules made, notification issued, licences or permits granted, powers conferred under any law hereby repealed shall, so far as they are not inconsistent with this Act, have the same force and effect as if they had been respectively made, issued, granted or conferred under this Act and by the authority empowered hereby in that behalf."

Thus, excise duties are now levied or leviable under this Act only on and from 1st April, 1957 when the Act came into force.

15. The duties of excise under section 3 (2) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 are leviable where the dutiable goods are manufactured in bond, in the State in which such goods are released from bonded warehouse for home consumption, whether such State is the State of manufacture or not, and in other cases the State in which such goods are manufactured.

16. In these cases, it was not the case of the petitioners that the goods are manufactured in bonds. Therefore, it is the State of Tamil Nadu, in which the goods are manufactured, that is entitled to levy the duty. Thus, on and from 1st April, 1957, the excise duties are levied or leviable on these goods in this State, under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Section 8 of the General Clauses Act, 1897, which was relied on by the learned counsel for the petitioners in support of his argument that any excise duty levied or leviable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, should be equated or deemed to be an excise duty levied or leviable under the Madras Prohibition Act, 1937, reads as follows :

> " Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

17. The scope of this section came up for consideration before the Supreme

Court in *State of Punjab* v. *Sukh Dev Sarup Gupta*[1]. It was held that the words "former enactment" in section 8 refers to both a Central Act or a provision thereunder, as also a State Act or a provision contained therein. It follows, therefore, that to the repeal of section 18-A in so far as it imposed the duty on Medicinal and Toilet Preparations and the re-enactment of that levy in the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the provision of section 8 is applicable. But, the difficulty is in understanding the enactment which is referred to in the words "references in any other enactment or in any instrument to the provisions so repealed" in that section. There could be no doubt that this reference is to the enactment which came to be made between the "former enactment", which was repealed and the Repealing and Re-enacting Central Act. The decision of the Supreme Court referred to above also related to such a case. But, in the instant case, section 18-A in the Madras Prohibition Act, 1937, was repealed by the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, but the Tamil Nadu General Sales Tax Act, 1959, which referred to the duty levied or leviable under the Madras Prohibition Act, 1937, came into force subsequent to the repeal of section 18-A.

18. The point for consideration is whether the reference to the Madras Prohibition Act, 1937, in the Sales Tax Act can be construed as a reference to the Prohibition Act as it was in force prior to the repeal of section 18-A.

19. Thiru V. K. T. Chari, learned counsel for the petitioners, while accepting that normally "reference in any other enactments" referred to in section 8, would comprehend within it an enactment which came between the enactment repealed and the Central Act which repealed and re-enacted, contended that there is an exception to this normal rule of interpretation. According to the learned counsel for the petitioners, if the repeal is not of the whole Act, and was only of of provision, then "any reference to the former enactment" in any subsequent enactment, whether such subsequent enactment was made prior to or after the repealing and re-enacting Act, should be construed as a reference to the provisions so re-enacted.

20. We are unable to agree with this contention of the learned counsel. When the Tamil Nadu General Sales Tax Act, 1959, referred to the Madras Prohibition Act, 1937, in the III Schedule, it can only be a reference to the Act as it was in force on the date when the Sales Tax Act came into force. There is no possibility of reading the provision as referring to the Madras Prohibition Act as in force in any other date. Thus, in item 3 of the III Schedule, reference to the Prohibition Act, could not be interpreted as the Madras Prohibition Act, 1937, as was in force prior to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. When an Act is repealed and re-enacted, nobody will refer to the repealed Act in any subsequent enactment. Nor, is it possible to read the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act into the Madras Prohibition Act.

21. We have, therefore, no doubt that the reference to the Madras Prohibition Act in Item 3 of the III Schedule, is to the Madras Prohibition Act, as in force on the date when the Sales Tax Act came into force and not on any date earlier. On the date when the Sales Tax Act came into force, the excise duty leviable under section 18-A had already been repealed and, therefore, if the Legislature wanted to exempt any goods that are subject to excise levy under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Legislature should have made a specific reference in item 3. In fact, in 1972, by a notification the Government have exempted those goods, which have been subjected to excise duty under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, from the levy of sales tax. But, that notification is not applicable to the assessment years in question.

22. We are, therefore, of opinion that the Medicinal and Toilet Preparations manufactured by the assessee were not entitled

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1. (1970) 26 S.T.C. 303 : (1971) 1 S.C.R. 449 : (1971) 1 S.C.J. 543 : A.I.R. 1970 S.C. 1641.

to the exemption under section 8 of the Sales Tax Act.

23. Since we have come to the conclusion that the goods are not at all exempt from levy of sales tax, the further question whether there was any error or mistake of law on the face of the record, which could only be on the basis that the goods are exempt, does not arise.

24. For the foregoing reasons, we dismiss these cases with costs. Counsel fee Rs. 150 in each.

S.J. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*C.J.R. Paul, J.*

Chinnaperumal Naicker... *Appellant**

v.

Mariyayee Ammal .. *Respondent.*

Hindu Marriage Act (XXV of 1955), section 23 (d)—Restitution of conjugal rights—Petition by wife—Inordinate delay—Proper approach in assessing effect.

Where there is delay in applying for restitution of conjugal rights by a wife, the Court must be satisfied that the delay had been substantially explained or was otherwise justified. While dealing with the question of delay, one should not be oblivious of the background and traditions of Hindu society and the instinct of reluctance amongst women to come to the Court and seek redress of their grievances against the husband. [*Para.* 11.]

No general rule can be laid down as to in what circumstances delay should lead to the non-suiting of an application under the Hindu Marriage Act. If the delay is intentional and amounts to acquiescence assistance should be refused straightway. If it is delay of optimism, namely, that the aggrieved party still hopes very often on a slender basis that things can be patched up and therefore avoids pushing matters to an issue, the delay should not lead to the non-suiting of the party who after prolonged optimism is disillusioned and goes to seek the assistance of the Court. [*Para.* 12.]

It may be delay of apathy, especially on the part of women, who generally speaking, are more helpless, than the men in the corresponding class, and in such cases the party just lets things drift without really grasping the legal consequences and after some years suddenly realises the extremely precarious postition to which it has brought itself and then stirs about so as to do something. Then there is the delay caused by the party experiencing difficulty in gathering sufficient funds for the expenses of initiating and continuing the proceedings.

Therefore the Court should be guided to some extent by what one might call for want of a better term, the humanitarian principle. The Court should also remember that delay, even when it raises the presumption of acquiescence, is open to explanation and the explanation whatever its worth should be given due consideration. [*Paras.* 13, 14, 15.]

The modern trend is to exercise a liberal discretion in cases where relief wouldhave been refused on the ground of unnecessary delay. All these would show that opportunity should be given to the party to explain the delay and the Court should consider the explanation and then decide whether the petitioner should be non-suited on account of the delay. Consequently where the party has had no opportunity to explain the delay as in the instant case, where the contention that by reason of the delay in filing the petition for restitution for conjugal rights, the respondent should have been refused the relief under section 23 (*d*) of the Hindu Marriage Act, had not been raised in the lower Court, the respondent cannot be non-suited. [*Para.* 16.]

Cases referred to:—

P.S. Rama Rao v. *P.R. Krishnamani Ammal*, (1973) 1 M.L.J. 203: 86 L.W.215: A.I.R. 1973 Mad. 279; *A.E. Thirumal Naidu* v. *Rajammal*, (1967) 2 M.L.J. 484: I.L.R. (1968) 3 Mad. 275: (1967) 80 L.W.412: A.I.R. 1968 Mad. 201.

Appeal against the Appellate Order of the Court of the District Judge, Tiruchira-

* A.A.A.O. No. 94 of 1974. 20*th March*, 1975.

palli, dated 16th January, 1974, and made in C.M.A.No.157 of 1971 (O.P.No.145 of 1969, on the file of the Subordinate Judge, Tiruchirapalli).

K. Raman, for Appellant.

E. Padmanabhan, for Respondent.

The Court delivered the following

JUDGMENT :—This Second Appeal is by a husband against whom his wife, the respondent had obtained a decree for restitution of conjugal rights on a petition filed by the respondent under section 9 of the Hindu Marriage Act, before the learned Subordiante Judge of Tiruchirapalli.

2. The appellant married the respondent in 1954 according to Hindu rites and they were living together as husband and wife till 1963. Now, according to the respondent in the year 1963, there was a big fire accident in Uppiliar Street, Dasanallur, Tiruchirapalli and the hut in which she was living with the appellant was also burnt down with the result that they had no place to live in and hence her husband, the appellant, asked her to go and live with her parents and promised to take her back after reconstructing the house and hence she, the respondent went to her parents' house and was living there. But the appellant did not make good his promise to take her back even though he put up a thatched house and began to live there and the appellant has been keeping a concubine by name Angammal in that house and at her instigation and on account of her influence he refused to take her back (the respondent) in spite of mediation by certain persons and in February, 1963, the appellant repaid to her a sum of Rs.200 which she had borrowed from third parties and lent to the appellant for reconstructing the house and the appellant made her affix her thumb impression on a blank paper representing that it was required as a voucher to evidence the repayment of that money and after obtaining her thumb impression, the appellant deserted her competely and she issued a notice to him on 17th October, 1969 to which the appellant sent a reply containing false allegations and stating that the marriage between them had been dissolved before a panchayat in accordance with the custom of their caste.

3. The appellant's case is that there is no marriage subsisting between him and the respondent for in accordance with the custom in the community a caste-panchayat was convened at which the marriage between him and the respondent was dissolved on 24th March, 1963 and to evidence such a dissolution of the marriage two documents were prepared and signed by both the parties and each was given one of those documents and jewels belonging to the respondent were returned to her as also the amount of Rs.200/- which she had borrowed from a third party and given to the appellant and after the divorce the respondent has not been living with the appellent but has been living with strangers.

4. Both the Courts below have found that such a custom in the community under which the marriage could be so dissolved had not been established. The learned Subordiante Judge found that there was a panchayat in the presence of the appellant's witnesses at which both the parties agreed to have a divorce and in pursuance thereof Exhibit B-1 has been brought into existence. The learned District Judge, however, did not make any decisive pronouncement with regard to Exhibit B-1, but observed that "even accepting that Exhibit B-1 was signed by both the parties knowing the contents fully well, in view of the finding that there is no custom of effecting such a divorce in the community, the conduct of the appellant constituted sufficient reason for the wife remaining away from her husband." In regard to the question as to whether the appellant had withdrawn himself from the society of the respondent for no justifiable or proper reasons the learned Subordinate Judge has observed that "admittedly the parties have not been living together and the respondent has been living in her father's house while the appellant is living in the same street with one Angammal who is said to be his aunt; and further the appellant had executed a settlement deed in favour of that Angammal dated 1st January, 1960 in respect of a house property wherein he has

described Angammal as his concubine and the appellant in the reply notice dated 31st January, 1966 which he sent through his advocate (Exhibit A-2) had stated that he the appellant had been arranging to marry again and in those circumstances, he, the learned Subordinate Judge considered that the respondent's case that the appellant had deserted her and had denied her conjugal rights was well-founded and the respondent was therefore entitled to the relief claimed and was entitled to restitution of conjugal rights.

5. The learned District Judge found that the appellant had made reckless allegations against his wife in the notice Exhibit A-5 to the effect that she was living in illicit intimacy with known and unknown persons and was living with one Ramaswami but had not substantiated those allegations and it was also brought out in evidence that the appellant was living with one Angammal on whom he settled his property as per Exhibit A-1 and hence the respondent had justifiable reasons for living away from her husband. He has also referred to the willingness expressed by the appellant in Court to live with his wife. All these, according to him, constitute sufficient reasons for the wife to live away from her husband and he therefore held that the respondent was entitled to a decree for restitution of conjugal rights.

6. The finding of both the Courts below is that as a custom of the community, whereby such a divorce as has been pleaded in this case and is said to be evidenced by Exhibit B-1, has not been established and that Exhibit B-1 cannot have the effect of severing the marital ties between the appellant the respondent that finding cannot be challenged in this second appeal.

7. Proceeding on the assumption that there was no divorce between the appellant and the respondent, the question is whether the respondent is entitled to a decree for restitution of conjugal rights. The learned counsel for the appellant has, first of all, contended that the execution of Exhibit B-1 by the respondent would amount to her withdrawing herself from the society of the appellant and as such she would be disentitled to ask for a decree for restitution of conjugal rights; and secondly there had been an inordinate delay in filing the application under section 9 of the Hindu Marriage Act for a decree for restitution of conjugal rights and on that ground alone the respondent's petition should have been dismissed.

8. No doubt Exhibit B-1 shows that a document was executed which has been signed by both the parties as well as by the respondent's father by which the parties have agreed to put an end to the marital relationship between them. The question is, whether in view of the fact that the respondent had signed this document, she should be construed as having by the execution of the document and thereafter living away from the appellant, withdrawn herself from the society of her husband. It may be noted that the respondent contended that her thumb impression was obtained on a blank-paper by her husband, the appellant, on the representation that it was to be a receipt for the repayment of the amount of Rs. 200 which the respondent had borrowed from a third party and advanced to the appellant to enable him to build a house. That story of the respondent has been disbelieved by the learned Subordinate Judge. Therefore we have to take it that under this document both the parties mutually agreed to live separately from each other. What would then be the effect of such an agreement between the parties is the question. This document was executed by both the parties and in my view the mere fact that the respondent joined in the execution of this document would not amount to an act of desertion by her of the appellant. The question whether the respondent was living away from her husband for just and lawful reasons has also been considered by both the Courts below and they have answered the question in the affirmative. There is the fact that it was at the instance of the appellant that a panchayat was convened and Exhibit B-1 was executed and after that the appellant had expressed his desire to marry another wife and given a notice Exhibit A-2 to the respondent. Further

the appellant had in Exhibit A-5 made reckless allegations against the respondent imputing unchastity to her. Even after the filing of the petition filed by the respondent, the appellant has stated in his evidence that he sent word through a third party expressing his willingness to take her back. But he actually never took her back. Even when this appeal was pending before me, an attempt was made to get the appellant before this Court for the purpose of effecting a reconciliation between the spouses but the appellant would not attend the Court and his counsel represented that the appellant was not willing to take back the respondent. Therefore undoubtedly it is the appellant who had deserted the respondent who has just and lawful grounds to live away from her husband as I have already stated above.

9. The learned counsel for the appellant contended that the inordinate delay in the filing of the petition for restitution of conjugal rights would disentitle the respondent from getting the relief which she had asked for. The learned counsel for the appellant has cited the decision in *P. S. Rama Rao* v. *P. R. Krishnamani Ammal*[1], in which it has been held that the inordinate delay in filing an application for restitution of conjugal rights would disentitle the husband from getting the relief of restitution of conjugal rights. But then it is from the circumstances of each case that the question of delay has to be decided. Now in this case, before, the learned Subordinate Judge this contention was not at all raised and no complaint was made by the appellant in regard to the delay in filing the application for restitution of conjugal rights. Before the lower appellate Court also this aspect had not been pressed, even though the learned counsel for the appellant contends that he did raise that point.

10. The question whether there was such delay as would disentitle the respondent from getting the relief asked for by her is not a mere question of law ; it is a mixed question of fact and law and it would not be fair now for this Court to allow the appellant to raise that ground as a ground for refusing the relief asked for by the respondent when he had not before the learned Subordinate Judge complained of the inordinate delay. Section 23 (*d*) of the Hindu Marriage Act is to the effect that if the Court is satisfied that there has not been any unnecessary or improper delay in instituting the proceeding and there has not been any of the other grounds mentioned in that section, it shall grant such relief accordingly. Therefore before granting the relief asked for the Court must be satisfied that none of the grounds mentioned in that section which would disentitle a petitioner from getting the relief which she was asked for exist. It is admitted that from the year 1963 the appellant and the respondent have been living separately, while the respondent has been living with her parents the appellant has been living separately with one Angammal.

11. It is incumbent upon the Court to be satisfied that the delay before coming to the Court had been substantially explained or was otherwise justified. But while dealing with the question of delay, one should not be oblivious of the background and traditions of Hindu society and the instinct of reluctance amongst the women to come to the Court and seek redress of their grievance against the husband. Raghavachariar in his Hindu Law (5th Edition at page 1937) has remarked that the words "unnecessary and improper" having regard to the culture of the orient and the general apathy that is inherent in that culture in the matter of resorting to Court for the remedy of the matrimonial grievance, have to be liberally construed and the delay ought not to be taken serious notice of by the Court.

12. No general rule can be laid down as to in what circumstances delay should lead to the non-suiting of an application under the Hindu Marriage Act, for the very simple reason that the delay may be the result of different causes in different cases, for example there is the delay which is intentional and which amounts to acquiescence in which case assistance should be refused straightway.

1. (1973) 1 M.L.J. 203 ; 86 L.W. 215 : A.I.R. 1973 Mad. 279.

Then there may be what might be called the delay of optimism, namely, the aggrieved party still hopes very often on a slender basis that things can be patched up and therefore avoids pushing matters to an issue; and where the indications are such the delay should not lead to the unsuiting of the party who after prolonged optimism is disllusioned and goes to seek the assistance of the Court.

13. Then there is the delay of apathy especially on the part of the women, who generally speaking, are more helpless, then the men in the corresponding class and in such cases the party just lets things drift without really grasping the legal consequences and after some years suddenly realises the extremely precarious position to which it has brought itself and then stirs about so as to do something.

14. Then there is the delay caused by the party experiencing difficulty in gathering sufficient funds for the expenses of initiating and continuing the proceedings.

15. Therefore, the Court should be guided to some extent by what one might call for went of a better term, the humanitarian principle. The Court should also remember that delay, even when it raises the presumption of acquiescence, is liable to explanation and the explanation whatever its worth should be given due consideration.

16. The modern trend is to exercise a liberal discretion in cases where relief would have been refused on the ground of unnecessary delay. All these would show that an opportunity should be given to the party to explain the delay and the Court should consider the explanation and then decide whether the petitioner should be unsuited on account of the delay. Consequently where the party has had no such opportunity to explain the delay as in this case, where the contention that by reason of the delay in filing the petition for restitution of conjugal rights, the respondents should have been refused the relief under section 23 (*d*) of the Hindu Marriage Act, had not been raised before the learned Subordinate Judge, the respondent cannot be unsuited.

17. With regard to the question as to what is the effect of the document Exhibit B-1 under which both parties agreed to live separately from each other, there is one decision which though not exactly covering the point makes some observations which would indicate that such an agreement would be no bar to the wife's suit for restitution of conjugal rights. That decision is the one in *A. E. Thirumal Naidu* v. *Rajammal* [1].

18. The net result is I find that there are no grounds to interfere with the orders of the Courts below and this Second Appeal is dismissed. No costs.

19. No leave.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

Smt. Chandravalli Bai Purshothamdass .. *Petitioner**

v.

Poonamchand Mittalal .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14 (1) (b)—Building let out to several tenants—Demolition and reconstruction—Petition for eviction against one tenant—Whether eviction could be ordered —Bona fide—*Requirement.*

There is in-built in section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act a safeguard under which the tenant could take shelter so as to thwart any pretences on the part of the landlord in the matter of the demolition of the building for purposes of reconstruction. The lever is that the tenant can seek for restitution if the landlord who has to peremptorily give an undertaking as provided for in section 14 (2) fails to demolish the same within the prescribed time. Whatever reason might prompt an indivi-

1. (1967) 2 M.L.J. 484 : (1968) I.L.R. 3 Mad. 275 : (1967) 80 L.W. 412 : A.I.R. 1968 Mad. 201.

* C.R.P. No. 3827 of 1974. 26*th August*, 1975.

dual to destroy his own property that cannot be the subject-matter of investigation by a Court of law. It is in this sense that the halo of *bona fides* which play a very prominent part in so far as petitions under the other sections of the Act are concerned, sinks, to more or less an insignificant level. In view of the fact that the landlord comes forward openly and publicly to demolish and destroy his property, that would not be a case which is automatically illustrative of the *mala fides* of the landlord. In such circumstances, there cannot be any acid test to measure the *bona fides* of the landlord in the matter of such eviction. [*Para*. 3.]

A part of a 'building' is also a 'building' within the meaning of the Act and the landlord can under section 14 (1) (*b*) file an application seeking for eviction of the tenant in occupation of that 'building' for purposes of demolition and reconstruction. [*Para*. 3.]

Case referred to :—

Selvaraj v. *Narasimha Rao*, (1969) 1 M.L.J. 587.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1973 praying the High Court to revise the Order of the Court of Small Causes (2nd Judge—Appellate Authority) Madras dated 19th November, 1974 and made in H.R.A. No. 47 of 1974 (H.R.C. No. 45 of 1971) Court of Small Causes, VI Judge, Madras.

V. R. Nagarajan, for Petitioner.

Himmatlal Mardia, for Respondent.

The Court delivered the following

JUDGMENT.—The Rent Controller Appellate Authority certainly has exceeded its limit in the exercise of its jurisdiction and has chosen to by pass the well accepted principle laid down by a Division Bench of this Court and which itself has stood the test of time for a considerable time. The petitioner landlady wanted the respondent to vacate the portion of the building in 202, N.S.C. Bose Road, Madras for the avowed purposes of demolition and reconstruction of the same. The petition was filed under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 herein-after referred to as the Act. The Rent Controller rightly ordered eviction. On appeal the appellate authority by a cavalier reasoning but without applying the well—established law of the State as laid down by the Division Bench of this Court has reversed the same and allowed the appeal and remitted the matter back to the Rent Controller for a disposal of the same in the light of the observations made by him. According to the appellate authority if there are other tenants occupying any other portion of the same building and no eviction application has been filed against any one or more of them, the present application for eviction directed against the respondent alone cannot be considered to be *bona fide*. It was in those circumstances the order of remit was made. On a reading of the appellate order, I find that the learned Judge is not emphatic that the petitioner is not going to demolish the premises in the occupation of the respondent for purposes of reconstruction. But what weighed in the mind of the appellate authority was that since the building was let out to different tenants and such tenaants were occupying independent and separate portions thereof, in the absence of a request to demolish the entire building (as a whole) and without the concurrent applications for eviction filed against such other occupants of the other portions of the building, section 14 (1) (*b*) would be inapplicable as according to him the petition savours of *mala fides*.

2. It does not appear from the judgment whether the appellate authority was apprised of the position as is clear from the ratio in the Division Bench Judgment in *Selvaraj* v. *Narasimha Rao*[1]. If it was brought to his notice it is very unfortunate that the appellate authority did not follow it. The only reasonable presumption that I could draw is that he was not able to understand that decision and hence he did not follow it. But if he did understand the *ratio decidendi* therein then the order of remit made by him and the observations on which the order of remit is based are absolutely without

1. (1969) 1 M.L.J. 587.

jurisdiction and is quite contrary to the well laid principle in the above decision.

3. The learned Judges constituting the Division Bench made it clear that there is in-built in the section 14 (1) (*b*) of the Act a safeguard under which the tenant could take shelter so as to thwart any pretences on the part of the landlord in the matter of the demolition of the building for purposes of reconstruction. The lever that is provided in the section is so obvious, for, the tenant can seek for restitution if the landlord who has to peremptorily give an undertaking as provided for in section 14 (2) fails to demolish the same within the prescribed time. The landlord should make it appear that his intention, ever since he entered his petition for eviction at the threshold of the Rent Controller's Court till the date when he physically and practically began to demolish his own property, was that the building has to be demolished for purposes of reconstruction. Whatever reason might prompt an individual to destroy his own property that cannot be the subject-matter of investigation by a Court of law. It is in this sense the halo of *bona fides* which plays a very prominent part in so far as petitions under the other sections of the Act are concerned, sinks, in my opinion, to more or less to an insignificant level. In view of the fact that the landlord comes forward openly and publicly to demolish and destroy his property, that would not be a case which is automatically illustrative of the *mala fides* of the landlord. In such circumstances, there cannot be any acid test to measure the *bona fides* of the landlord in the matter of such eviction. It is this which was made clear in the Division Bench Judgment. Inspite of it the appellate authority thought that since the respondent was occupying only a part of the building and as the landlord has sought for eviction of the respondent only from that part of the building, it would be necessary to investigate further whether the landlord is inclined to demolish the other portions of the building which is not the subject-matter of the enquiry at all. Apparently, the learned Judge did not bear in mind the definition of a building in the Act as given out in section 2 (2) of the Act which says 'building' means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes and includes ...." The statute therefore recognises a part of a building as a building. If this unit which has been given out as a measure in the statute itself is borne in mind then the question whether the landlord is inclined to demolish the other portions of the building and whether he is going to file eviction petitions against the other tenants in the building is outside the purview of enquiry. In so far as the respondent is concerned, he is occupying a 'building' within the meaning of the Act and petitioners as landlord can under section 14 (1) (*b*) file an application seeking for eviction of the tenant in occupation of that 'building' for purposes of demolition and reconstruction. This is so because a part of a building is also a building. The learned appellate Judge therefore did not bear in mind the fundamentals which govern the position in such circumstances, and he has erred in exercising his power of remit on the basis of the observations already referred to. The order of the appellate authority is therefore set aside and the revision petition is allowed. The counsel for the respondent requests time to vacate. Obviously his client is serious to vacate the premises. Taking this aspect into consideration the respondent is granted four month's time to vacate. No costs.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Maharajan, J.*

Ariamuthu and others .. *Appellants**

v.

Latchoumanapoulle .. *Respondent.*

(A) *Hindu Law of French Indian Territory—Gift to son for life with gift over to donee's unborn sons—Son proving ungrateful to the donor—Revocation of gift in favour of son—Donor executing will—Effect.*

(B) *Code Civil, Articles* 896 *and* 906.

Under Article 906 of the Code Civil of France in order to be capable of receiving

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*S. A. (Civil) No. 279 of 1969. 10*th December,* 1974.

a donation *inter vivos* it is necessary that the donee should have been at least conceived at the time of the donation. But there is an important exception to the rule embodied in Article 906. The rule is satisfied once there is a person in existence capable of taking directly the grant or the legacy and there is no need for the beneficiary who is to take through him to be in existence. Under Article 1048 of the Code Civil it is lawful for every one to give or bequeath property to any one or more of the grantor's children, subject to the obligation to transfer the same to all the children, born or to be born, of the grantee or grantees equally. [*Para.* 7.]

Decisions of French Courts are to the effect that where a deed of gift in favour of the *greve* has been revoked for ingratitude, succession in favour of the *appele* would open immediately on revocation. Revocation would revest the property in the donor, who would keep it under an obligation to hand over the property to the *appele* in case he survives the *greve*.

[*Para.* 8.]

Cases referred to:—

Raman Nadar v. *S. Rasalamma*, (1970) 2 S.C.R. 471: (1970) 2 S.C.J. 738: A.I.R. 1970 S.C. 1759; *Tagore's case*, (1872) I.A. (Supp.) 47 (P.C.).

Appeal against the decree dated 25th July, 1968 of the Superior Court of Appeal, Pondicherry in Appeal No. 637 of 1965 preferred against the Judgment, dated 28th August, 1964 of the Court of First Instance, Karaikkal, in suit regarding the Will dated 30th December, 1960 of Arunachalam Pillai in favour of the defendants.

N. Arunachalam, for Appellant.

A. Balapajanar and *V. R. Venkataraman*, for Respondent.

The Court delivered the following

JUDGMENT.—This special appeal, which is really in the nature of a second appeal, raises certain questions of law. One Arunachalam Pillai, who was the original owner of the suit property (situate in Karaikkal), had four sons (1) Thirumeni (Fourth defendant and father of defendants 1 to 3), (2) Subramanya (father of the plaintiff), (3) Amirthalingam (fifth defendant) and (4) Shanmugam (sixth defendant) and two daughters (1) Meenakshi and (2) Punithavalli (ninth defendants) whose daughter is Damayanthi, the eighth defendant. On 18th May, 1936 Arunachala gave away his second son Subramanya in adoption to one Lakshmana Pillai of Devakkottai. About three weeks before the date of the adoption Arunachala, the natural father, executed a gift under a notarial deed dated 27th April, 1936. Under this deed, Subramanya the donee was to enjoy the usufruct of the suit property for his life and the "*nue propriete*" (which approximates to a vested remainder in Indian law) was to go to the sons to be born to Subramanya, and in case Subramanya failed to beget any son, it was to go to a son to be adopted by him from among the sons of his natural brothers. Under French law, the mechanism involved in the donation would be regarded as substitution *fidei commissarie*. Subramanya, who got the usufruct, is regarded by French law as a *greve*, whereas the person to whom the "*ne propriete*" (naked ownership) was given would be regarded as an "*appele*". This deed of gift was followed, as I said, by an adoption of the donee into a Devakkottai family on 18th May, 1936. It appears that after the adoption bad blood developed between Arunachala and Subramanya and the latter inflicted violence upon the former. Under Article 926 of the Code Civil it is open to a donor to revoke a deed even after it has come into effect, in case the donee proves ungrateful to the donor. But this revocation could be effected not by a unilateral document, but only by resort to a Court of law, which after satisfying itself about the ingratitude of the donee, would decree revocation of the deed of gift. Arunachala resorted to this provision of law and filed an action in the Court of First Instance, Karaikkal against his son Subramanya and prayed for cancellation of the donation dated 27th April, 1936 on the ground of ingratitude on the part of the donee. Subramanya, for reasons best known to himself, remained *ex parte* in that action; whereupon the Court granted a decree on 5th August, 1939 revoking the gift in favour of Subramanya. It may be noted that neither at the time of

the donation nor on the date on which it was revoked had any son of Subramanya been conceived or born. The plaintiff, who is the son of Subramanya, was born only on 29th October, 1941. It is not known whether the bitterness that Arunachala had towards Subramanya extended to Subramanya's son Lakshmana Pillai. I have reason to doubt if Arunachala ever intended to visit the sons of Subramanya upon his unborn son. This can be gathered from the circumstance that at a partition, which Arunachala effected on 30th November, 1949 by a notarial deed between himself and his three sons Thirumeni, Amirthalinga and Shanmuga, he refrained from subjecting the suit property to partition. That might probably be because he wanted the "*nue propriete*" to be enjoyed by Subramanya's son in accordance with the deed of donation dated 27th April, 1936. It may also be noted at this juncture that what Arunachala sought revocation of was not the gift over in favour of Subramanya's prospective sons but only that part of the gift which related to the usufruct for life in favour of Subramanya. Arunachala ultimately died on 6th February, 1961. In his last days, while he was probably on his death-bed, he seems to have been persuaded to execute a testament dated 30th December, 1960, whereby he bequeathed the suit property to his natural sons, daughters and grand-daughters (defendants 1 to 9).

2. On 27th June, 1962, the plaintiff instituted a suit in the Court of First Instance, Karaikkal, praying for a declaration that the will dated 30th December, 1960 was null and void and for a direction that the judgment declaring it null and void be transcribed in the margin of the entry registering the factum of the will. The claim was resisted by the defendants on the ground that by judgment dated 5th August, 1939 the whole of the gift deed dated 27th April, 1936 stood cancelled including the gift over in favour of the plaintiff and that the entirety of the property reverted to Arunachala who validly bequeathed the same in favour of defendants 1 to 9. The Court of First Instance rejected the contentions of the defendants and granted a decree in favour of the plaintiff, declaring the will dated 30th December, 1960 null and void and declaring the plaintiff the absolute owner of the suit property. Against this judgment, the defendants preferred an appeal to the Superior Court of Appeal, Pondicherry. The first appellate Court concurred with the findings of the trial Court and dismissed the appeal with costs. It is against this dismissal that the present special appeal has been filed.

3. It is contended on behalf of the appellants that though what was cancelled under the judgment dated 5th August, 1939 was only the gift of the usufruct in favour of Subramanya, still inasmuch as on the date of cancellation the plaintiff was still unborn, the entire property reverted to the donor Arunachala and consequently Arunachala could validly execute a testament on 30th December, 1960 bequeathing the properties in favour of the defendants. On the other hand, learned counsel for the plaintiff contends that whether we consider the question from the point of view of French Hindu Law or from the point of view of the French Code Civil, that cancellation of the gift of the usufruct in favour of Subramanya, did not in any manner affect the validity of the gift over of the true *propriete* in favour of the unborn son of Subramanya. The main question that arises for consideration, therefore is whether after the cancellation of the gift of the usufruct in favour of Subramanya, the gift of the "*nue propriete*" in favour of his unborn son, continued to be in force in the eye of law. As I have already stated, what was sought by Arunachala to be cancelled and what the Court actually cancelled by its judgment, dated 5th August, 1939 was, not the entirety of the deed of donation dated 27th April, 1936, but only that part of the deed which gifted the usufruct in favour of Subramanya for the term of his life. The deed was, in fact, in the nature of a double-gift and the gift could not be cancelled except for ingratitude of the donee. So far as the first gift in favour of the donee Subramanya was concerned, it was open to the donor in French law to have it cancelled by proving the donee's ingratitude. But so far as the second gift in favour of the unborn son of Subramanya was concerned, there was no scope in French law for Arunachala to revoke it,

because he could not allege nor prove that a son who was yet to be born was guilty of ingratitude towards him. It is therefore clear that it was not and could not be the intention of Arunachala at the time he instituted the suit against Subramanya that the gift of the vested remainder in favour of his unborn son could also be revoked. What, then, is the legal position if the gift of the usufruct alone was legally revoked? After the revocation, there remained the gift of the naked ownership in favour of an unborn son. The question arises whether under Hindu Law, as it has been understood in the erstwhile French Indian territory, a gift could be validly made in favour of an unborn son. This very question was put to the *'Comite Consultatif de Jurisprudence Indienne.*" The French Courts, like the Courts set up by the East India Company, used to refer difficult questions of Hindu Law to experts and a consultative committee was constituted in French India which consisted of members of different communities and to which Courts used to refer for their opinion upon Hindu Law and usage.

4. In 1831, the question whether a donor governed by Hindu Law could validly donate his or her property in favour of an individual to be born was referred to the consultative committee by the Court and the opinion of the Committee was: 'According to the usage and custom of the Hindus, the donor can validly gift his or her property in favour of individuals to be born, but the committee is unable to point to the book of laws or the Hindu Law text concerning this point". (Vide page 90 of Leon Sorg's Avis.)

5. It is therefore clear that under pristine Hindu Law, as it was in force in the French Indian territory, a gift made by a Hindu in favour of an unborn son was valid. In fact, according to the Supreme Court, this was also the position is the rest of India under Hindu Law. In *Raman Nadar* v. *S. Rasalamma*[1], the Supreme Court observed as follows:

> " Although there is no authority in Hindu Law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person, yet that doctrine has been engrafted on Hindu Law by the decision of the Judicial Committee in *Tagore's case*[1].

Their Lordships proceed to say that the Judicial Committee misinterpreted the Hindu Law text which neither expresses nor implies that the 'sentient being' mentioned in the text must be in existence or be present at the time and place of the relinquishment under a gift. Their Lordships reinforced this view by saying that the paragraphs 21 to 24 of Chapter I of Dayabhaga shows that a gift is completed by the donor's act alone, the acceptance of the donee being not necessary. Indeed, in the very next passage, Dayabhaga speaks of gifts to God thereby showing that the validity of the gifts does not depend upon acceptance. After making these observations, however, their Lordships said that though the Judicial Committee in the *Tagore's Case*[1], had misinterpreted this passage, the law as expounded by the Judicial Committee had stood a great length of time and on the basis of that decision rights had been regulated, arrangements as to property had been made and titles to property had passed. Consequently the Supreme Court said: " We are hence of the opinion that this is a proper case in which the maxim *'communis error facit jus'* may be applied. " In other words, according to the Supreme Court, the Hindu Law unamended by legislation permitted gifts in favour of unborn persons, and but for the Privy Council ruling in the *Tagore's case*[1], they would have held that such a gift would in the eye of pristine Hindu Law be perfectly valid. This opinion of the Supreme Court is in striking conformity with the opinion given by the members of *comite consultatif* at Pondicherry.

6. Learned counsel for the appellants contended that though the Supreme Court held that the Privy Council had misinterpreted the Hindu Law, it has chosen to follow the ruling of the Privy Council and that I must, therefore, apply the principles laid down in the *Tagore's case*[1], even to the facts of this case. I am entirely unable to agree. At the time

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1. (1970) 2 S.C.R. 471 : (1970) 2 S.C.J. 738 : A.I.R. 1970 S.C. 1759.

1. (1872) I.A. (Supp.) 47 (P.C.).

of the gift the donor in this case was a French Indian citizen governed entirely by Hindu Law as it was practised in that territory. The rulings of the Privy Council or the Surpeme Court of India had no binding effect whatsoever upon the citizens of French India before the merger. It would, therefore, follow that I ought to hold that the donation in question in favour of the unborn plaintiff is valid in the light of Hindu Law, which even according to the Supreme Court, (but for the misinterpretation of the Privy Council) permitted gifts in favour of unborn persons.

7. Approaching the gift deed even from the point of view of the Code Civil, I feel compelled to come to the same conclusion. It is true under Article 906 of the Code Civil, in order to be capable of receiving a donation *inter vivos* it is necessary that the donee should have been at least conceived at the time of the donation. But there is an important exception to the rule embodied in Article 906. As, observed in "Amos and Waltens Introduction to French Law", (Second Edition) at page 131, the French Courts have accepted the view that the rule of Article 906 is satisfied once there is a person in existence capable of taking directly the grant or the legacy and that there is no need for the beneficiary who is to take through him to be in existence. In this case, the donee of the usufruct was in existence at the time of the gift. The donation in favour of the sons of Subramanya would be valid despite the fact that his sons were not born at the time of the gift deed. In French Law, the Roman concept of *substitution fidei commissaire* is invoked for the purpose of supporting the validity of donations of the kind in question before me. A substitution, in its widest sense, is disposition by which a third party is called upon to take the benefit of a gift either in default of the original beneficiary or after him. Under Article 896 of the Code Civil substitutions are prohibited, and every disposition of property whereby the donee or testamentary heir or the legatee is required to keep it intact and to transfer it to a third party is void even as respects the gift to donee, testamentary heir and the legatee. But, to this rule, Article 1048 of the Code Civil makes an exception by saying that it is lawful for every one to give or *bequeathe* property to any one or more of the grantor's children, subject to the obligation to transfer the same to all the children, born or to be born, of the grantee or grantees equally. The donation in this case would come under this exception. The grantee of the usufruct in this case was the grantor's son, and the grant was subject to the obligation to transfer the property to all the children, born or to be born, of the grantee. The question, then, arises, what is the legal effect in French Law of the cancellation of the grant in favour of Subramanya ?

8. On the date of the grant, the plaintiff, who is the son of Subramanya, was unborn. In such a case, according to French jurisprudence ,the property would revert to the grantor subject to the obligation to hand over the same eventually to the son of Subramanya to be born. As per Note 540 "Dalloz Repertoire Pratique" (Volume 11), under the heading " Substitution ", decisions of French Courts have been quoted to the effect that where a deed of gift in favour of the *greve* has been revoked for ingratitude, succession in favour of the *appele* would open immediately on revocation, though according to certain other rulings, revocation would revest the property, in the donor, who would keep it under an obligation to hand over the property to the *appele* in case he survives the *greve*. In this case, the plaintiff was born on 29th October, 1941. At that time, Arunachala, the donor was still alive. The plaintiff, who has survived his father Subramanya, would become entitled under French Law, either on the death of the donor or on the death of the *greve* , to absolute ownership in the suit property. The will executed by the donor on 30th December, 1960, in favour of the defendants 1 to 9 in disregard of his duty to hand over the property to the plaintiff, as per the terms of the gift deed dated 18th May, 1936 is, therefore, null and void. Both the Courts below were consequently right in declaring the plaintiffs absolute title to the suit property. The defendants, who have preferred this appeal, must, therefore, fail. This appeal is consequently dismissed with costs. Leave granted.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C J.* and *S. Natarajan, J.*

K. Appa Rao and another .. *Appellants**

v.

P. Balasubramania Gramani and others .. *Respondents.*

Specific Relief Act (1 of 1877), sections 28 and 27 (b)—*Shares in joint family property—Agreement to sell—Consideration grossly inadequate—Specific performance of agreement—Whether could be granted.*

Specific performance of an agreement to sell immovable property is not invariably ordered as a matter of right. The relief is discretionary ; but the discretion being a judicial one, it has to be exercised neither arbitrarily nor unreasonably, but according to law and reason. Specific performance of an agreement cannot be enforced against a party thereto if the consideration to be received by him "is so grossly inadequate with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff." Two matters will have to be considered ; one, while consideration was obviously inadequate, was it grossly inadequate ; and the other, whether the fact by itself or in association with other circumstances would amount to undue advantage taken by the party asking for enforcement of the agreement. The first one involves a question of degree. If the inadequacy of consideration is so much as to shock the conscience of the Court in respect of the fairness of the agreement, it is a case of gross inadequacy of consideration. When the inadequacy is unconscionable or is so patently unjust that it savours by itself of fraud or amounts to that when it is taken in conjunction with other circumstances that exist on the date of the contract, it will help a defence. [*Para.* 3.]

The concept of Hindu joint family property is that each of the coparceners is entitled to the same right as the other and they all hold together the co-parcenary property and that when a partition is effected all that happens is, not a transfer of interest from one to the other, but only release of the interest of one co-parcener in favour of the other in specific immovable property allotted to the latter as and for his share. A sharer on partition does not derive title to his share from anyone else and therefore it cannot be said that he is claiming under somebody for the purpose of application of section 27 (*b*) of the Specific Relief Act. [*Para.* 4.]

Cases referred to:—

Fateh Chand v. *Narsingh Das,* (1915) 22 Cal.L.J. 383 : 16 I.C. 988 ; *Rangayya Reddy* v. *Subramania Ayyar,* (1917) I.L.R. 40 Mad. 365 : 32 M.L.J. 575 : 5 L.W. 797 ; *Venkataramayya* v. *Raghavalu,* (1925) 21 L.W. 62 : A.I.R. 1925 Mad. 492.

Appeals under Clause 15 of the Letters Patent against the decrees of the Honourable Mr. Justice Srinivasan dated 20th January, 1967 and passed in S.A.Nos.1612, 1611 and 1613 of 1962 respectively preferred to the High Court against the decree dated 7th October, 1961 and passed in A.S. No. 169 of 1960 A.S. No. 170 of 1960 and A.S. No. 171 of 1960 on the file of the principal Judge City Civil Court, Madras (O.S. No. 770 of 1958, O.S. No. 748 of 1958 and O. S. No. 749 of 1958 respectively on the file of the IIIrd Assistant Judge City Civil Court, Madras).

K. Parasaran, for Appellants.

M. S. Venkatarama Iyer, N. Sivamani and *V. Narayanaswami,* for Respondents.

The Judgment of the Court was delivered by

Veeraswami, CJ.—These are appeals by the legal representatives of the plaintiff under the Letters Patent. The plaintiff or his legal representatives as the case may be, had failed in all the Courts below to get specific performance of the three agree-

* L.P.A. Nos. 22, 23 and 24 of 1968.

7th April, 1975.

ments, all executed on 28th October, 1957 to sell certain shares, which the executants of the agreements had in certain joint family properties. The three agreements put together had undertaken an obligation to convey to the plaintiff a total of 3/5 share in those properties. At the time the agreements were entered into, O. S. No. 150 of 1952, which was a suit for partition by two of the coparceners, was pending, and in fact, a preliminary decree had been passed in 1954. Defendants 3 to 7 forming one unit, defendants 8 and 9 forming another unit and defendant 10 in that suit for partition, who held each 1/5 share, were the executants. On 18th April, 1958, the plaintiff sought to get himself impleaded as a party defendant in the partition suit,but without success. The suit for partition eventually ended in a compromise decree dated 1st May, 1958, the effect of which was that whatever share the executants of the agreements had agreed to convey had in fact been allotted to the plaintiff and defendants 1 and 2 in that suit. The trial Court found that the agreements were not genuine and dismissed the suit. In passing, it had also observed that if the agreements, were genuine, there would be no difficulty in holding that the compromise decree in the partition suit would be a collusive one against the interest of the plaintiff and that, as such, it would not bind him. The first lower appellate Court did not share that view, but held that the agreements were genuine. But it being of opinion that the consideration for the agreements was grossly inadequate it declined to grant a decree for specific performance. In second appeal, Srinivasan, J., concurred with the first appellate Court and dismissed it.

2. Two questions, which arise for our decision, are:

1 Whether the agreements aforesaid were for grossly inadequate consideration, so that specific performance of the agreements should not be ordered in view of section 28 of the Specific Relief Act, 1877; and,

2. If that question were answered in favour of the appellants, whether they could still succeed in the light of the compromise decree and section 27 (*b*) of that Act. In order to appreciate the first question, the related facts are briefly these. The agreements were to convey a total of 3/5 share in what was called Samadhi Thottam and Panantope. The first was of an extent of 7 acres 26 cents. Pending the partition suit, there was a Receiver appointed. The plaintiff had offeredRs.7,250 for the first property to the Receiver, and at a subsequent stage, the very same plaintiff enhanced his offer to Rs. 8,500 Pananthope, we find, was of an extent of about 5 acres. But this item of property had been sold away by the Receiver, and it does not form the subject-matter of the suit. The first appellate Court, with whom Srinivasan, J., agreed, held that in view of the offer made by the plaintiff himself for one of the properties covered by the agreements, each of which was executed for a consideration of only Rs. 800 for Samadhi Thottam the consideration was not only inadequate, but grossoly inadequate which attracted the provisions of section 28 of the old Specific Relief Act.

3. Specific performance of an agreement to sell immoveable property is not invariably ordered as a matter of right. The relief is discretionary; but the discretion being a judicial one, it has to be exercised neither arbitrarily nor unreasonably, but according to law and reason. The Specific Relief Act itself has provided certain guidelines as to when specific performance could be ordered and when not. Section 28 is one of them, which provides what parties cannot be compelled to perform. Specific performance of an agreement cannot be enforced against a party thereto if the consideration to be received by him "is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff". Two matters will have to be considered: one while consideration was obviously inadequate, was it grossly inadequate; and the other, whether the fact by itself or in association with other circumstances would amount to undue advantage taken by the party asking for enforcement of the agreement. The first one involves

a question of degree. If the inadequacy of consideration is so much as to shock the conscience of the Court in respect of the fairness of the agreement, it is a case of gross inadequacy of consideration. It is not any inadequacy of consideration that will help a defence in a suit for specific performace but when the inadequacy is unconscionable or is so patently unjust that it savours by itself of fraud or that it amounts to that when it is taken in conjunction with other circumstances that exist on the date of the contract. In the instant case, the plaintiff himself had valued one of the two items covered by these agreements at more than Rs. 8,000. That being the case, we are of opinion that the sum of Rs. 800 for 1/5 share was grossly inadequate. That was the view of Srinivasan, J., with which we agree. The learned Judge has also pointed out the miserable and unenviable position in which the executants were placed *vis a vis* the powerful plaintiff who took undue advantage of their position and had the agreements executed in his favour. That will suffice to conclude the appeals against the appellants.

4. But the other question, which we have formulated at the start of this judgment, has also been argued at the Bar, and in fairness thereto we shall notice it. Section 27 (*b*) relied on by the respondents is to the effect that except as otherwise provided by the chapter in which the section occurs, specific performance of a contract may be enforced against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. It is contended for the respondents that plaintiffs 1 and 2 and defendants 1 and 2 in the partition suit, to whom the whole of Samadhi Thotam had been allotted as and for their share, could not be regarded as persons claiming under the executants of the agreements in favour of the plaintiff in the instant case. But this contention is met by the learned Advocate-General for the appellant by relying on the finding of the trial Court that the decree in the partition suit was a collusive decree inasmuch as it had been entered into by all the parties concerned with full knowledge of the agreements. *De hors* authority, we should have found no difficulty in accepting the contention for the respondents. But the learned Advocate-General has invited our attention to *Fateh Chand* v. *Narsingh Das*[1] *Rangayya Reddy* v. *Subramania Ayyar*[2], and *Venkataramayya* v. *Raghavalu*[3]. The first of these cases did not involve a suit for partition pending which agreements, sought to be enforced specifically had been entered into. The question mooted for the respondents whether persons, to whom allotment of this or other specific property was made in a suit for partition, which belongs to a joint family, can be regarded as claiming title thereto under any other coparcener, did not fall to be decided in that case. But the Court held that a plaintiff who sought specific performance of an agreement could show that the compromise decree which was put in defence, was fraudulent and collusive and that it would not affect his legal rights. It is this principle which the learned Advocate-General sought to press into his service. In the second case, *Rangayya Reddy* v. *Subramania Ayyar*[2], the only two questions which were referred for decision were : (1) whether defendants 2 to 5 in that case were proper parties to the suit; and (2) whether the relief of partition and possession could be claimed by the plaintiffs in one suit as well as execution of a sale deed.

The first question was answered in the affirmative and the second in the negative. In so doing, one of the learned Judges (Srinivasa Ayyangar, J) observed :

> " But a partition involves the release of the interest of the other coparceners in the properties allotted to one of them and though by virtue of their prior title defendants Nos. 2 to 5 may be entitled to a release from the first defendant of his

1. (1915) 22 Cal.L.J. 383 : 16 Indian Cases 988.
2. (1917) I.L.R. 40 Mad. 365 : 32 M.L.J. 575 : 5 L.W. 797.
3. (1925) 21 L.W. 62 : A.I.R. 1925 Mad. 492.

> interest in his properties the subject of the present suit, if these properties were allotted to them in a fair partition without their being affected by the contract of sale which can only operate subject to their rights, yet if the partition is proved to be a fraudulent design to defeat the rights of the plaintiff under his contract of sale, by the first defendant giving up the chance of the suit properties or a share in them being allotted to him in a fair division, I think that defendants 2 to 5 in such a case may fairly be treated as subsequent transferees with notice."

It is not clear whether the learned Judge in making this observation had in view section 27 of the old Specific Relief Act at all. It would appear that the learned Judge was rather proceeding on the general principle that a plaintiff, who seeks specific performance of an agreement, can attack a compromise decree standing in his way as having been obtained fraudulently or collusively. The last case, *Venkataramayya* v. *Raghavalu*[1], decided by Devadoss, J., held that where an undivided coparcener of a joint Hindu family, consisting of himself and his brother, entered into a contract for the sale of his share in the joint family properties, which consisted only of two items of land and subsequently effected a settlement conveying his share to his brother, who took the settlement with knowledge of the contract, the promisee under the contract was entitled to specific performance, as against the brother who took the settlement and that the brother who took the settlement was a transferee within the meaning of section 27 (*b*) of the Specific Relief Act, 1877. On facts, this case seems to be nearer to the one under our consideration. But the question is whether a coparcener allottee at a partition of a particular property as and for his share can be regarded as claiming under any one or other of the coparceners, who, on partition, were allotted other properties so as to attract section 27. It has been recognised in *Rangayya Reddy* v. *Subramania Ayyar*[2], that a partition involves the release of the interest of each of the coparceners in the joint Hindu family and that no member of a joint Hindu family as a coparcener can predicate either the quantum of his share in the joint family or claim a particular property or specific item as belonging to him or referable to his share. The concept of joint Hindu family property is that each of the coparceners is entitled to the same right as the other and they all hold together the coparcenary property and that when a partition is effected all that happens is, not a transfer of interest from one to the other but only release of the interest of one coparcener in favour of the other in specific immovable property allotted to the latter as and for his share. In such circumstances, it is, in our opinion, doubtful whether there is any occuasion to apply section 27 (*b*) for, in such a case, there is no room for applying the language "any other person claiming *under* him." A sharer on partition does not derive title to his share from any one else and, therefore, it cannot be said that he is claiming under somebody for the purpose of the application of the section. Even assuming, therefore, that the compromise decree was collusive, it is not possible to apply section 27 to a case like this.

5. On the question whether the compromise decree was collusive it is true the first Court gave such a finding. But these are cases where the agreements sought to be enforced were entered into the pending suit for partition and, therefore, the agreements would be affected by the doctrine of *lis pendens*. Where, under the personal law, the parties, in a suit for partition are entitled to allotment of particular properties as and for their shares irrespective of any agreement entered into by any one of the sharers to sell any quantum of their share, it would be hardly, possible to say that the compromise resulting in allotment of properties was collusive. The Trial Court, in concluding that the decree was collusive, did not consider any specific circumstances which would justify that conclusion. It may be that the parties in the suit for partition were aware of the agreements. But if, notwithstanding the agreements, under the personal law they were entitled to allotment, as they desire as per the

1. (1925) 21 L.W. 62 : A.I.R. 1925 Mad. 492.
2. (1917) I.L.R. 40 Mad. 365 : 32 M.L.J. 575 : 5 L.W. 797.

agreement on which the compromise decree was based, it cannot be said that that by itself should necessarily lead one to the conclusion that the said compromise decree is collusive merely because it is against the interest of the plaintiff in the present suit.

6. As a matter of fact, in the plaint no ground was taken that the compromise decree was collusive ; nor was there any specific issue on that question. It is not also clear whether any evidence was directed on the point. The first lower appellate Court did not consider this question at all.

7. Anyway, since these appeals are capable of disposal on our answer to the first question which we have set out at the beginning, we do not think it necessary to express any final opinion on the second question. The appeals are, therefore, dismissed. No. costs.

R.S. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Sridharan (Minor) and others .. *Appellants**

v.

Murthi Brothers, Tirupur by partner C. S. Balasubramani and another .. *Respondents.*

Hindu Law—Joint family —Father manager of family of agriculturists— Father starting cotton trade— Incurring debt— Minor son— Whether liable.

In a Hindu joint family, which is a non-trading family, it is left to the option of the father-manager, on partial partition of the family to formulate schemes in the matter of acquisition of property by lawful means and if, in the course of wishful thinking, the father manager departs from the usual avocation of the family and starts a new business as an entreprenour, that by itself cannot be characterised as an activity of the father which is not contemplated in the personal law or is against it. If such a business conducted by the father manager is *ex facie* a speculative one or one which no reasonable or prudent person would characterise as a business undertaken by the father-manager in the interests of the other members of the family, then things might be different. But, on the only ground that the new business has been started by the father-manager, as a commercial activity thought of by him and for the purpose of prudentially conducting it for the benefit and welfare of his children and other coparceners of the family, that by itelf would not raise any presumption, that the debts contracted in the course of the working of such a commercial activity are by themselves *avyavaharika* debts. *Avyavaharika* is a concept which is peculiar to the personal law of the Hindus ; it is not *vyvaharika.* The term *vyavaharika* means "in the normal course." The opposite of *vyavahara* therefore should give an impression to a normal person that an abnormal activity was thought of by the father-manager or indulged in by him.

[*Para.* 8.]

Held, on facts, that the cotton business carried on by the father was for the benefit of the family and it was a new business which he *bona fide* started for the purpose of improving that finances of the family and the debts incurred were binding on the sons and they were liable to pay the debts from and out of their shares in the joint family properties.

[*Para.* 9.]

Cases referred to :—

Achutaramayya v. *Ratnajee Bhootaji*, I.L.R. (1926) Mad. 211 : 50 M.L.J. 208 : A.I.R. 1926 Mad. 323; *Rajan* v. *Kannikonda Reddiar*, (1975) 1 M.L.J. 26 : 88 L.W. 205 : A.I.R. 1975 Mad. 117.

Appeal against the decree of the Court of the Third Additional Subordinate Judge, Coimbatore, dated the 26th day of October, 1970 and passed in O. S. No. 501 of 1967.

B. Soundarapandian, K. Venkatasubba Raju and *R. Balakrishnan*, for Appellant.

* Appeal No. 486 of 1971.

18th April, 1975.

M. Ramachandran and *S. Ramalingam*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Defendants 2 to 4, who are the minor sons of the first defendant in the suit, O. S. No. 501 of 1967, on the file of the Court of the Subordinate Judge, Coimbatore, are the appellants. The plaintiff is a trader. He sold and delivered goods on credit to the first defendant, who was carrying on business under the name and style of Coimbatore Cotton Company and was also running a ginning factory, known as the Rukmani Ginning Factory, at Sultanpet in Palladam Taluk. The plaintiff's case is that for a considerable length of time the first defendant, the father of the appellants herein, though an agriculturist, was also doing business in cotton. In the course of such business, which the first defendant claimed as his sole proprietory business, goods were supplied on credit to him by the plaintiff during the period from 6th August, 1966 to 30th September, 1967. In accordance with the accounts regularly kept by the plaintiff, a sum of Rs.45,907.11 was due by the first defendant as the principal debtor, and defendants 2 to 4 as members of the undivided family, as also interest thereon, from that date to the date of the institution of the action. The plaintiff claims that the busniess was conducted by the first defendant as the manager of the joint family consisting of himself and defendants 2 to 4 and that, as the borrowing was for the benefit of the minor children, all the defendants were liable for the suit claim, as, according to the plaintiff, there was no taint in the borrowing and in that sense it was not an *avyavaharika* debt.

2. The first defendant submitted to a decree and prayed for six months' time, though in the first instance, he disputed the quantum of the liability.

3. The mother of defendants 2 to 4, as their guardian, filed a written statement, stating that the family was purely an agricultural family, that the first defendant started the cotton trade by himself, and that, as that business was started newly by the father-manager, the minor coparceners were not liable for the suit claim.

4. It is common ground that prior to the institution of the action, no notice of demand was issued to defendants 2 to 4 as minor coparceners of the family. Even the notice said to have been issued by the plaintiff to the first defendant has not been filed. It was under those circumstances and on the above relevant pleadings, the trial Court took up the case for trial after framing the following issues :

1. Whether the suit debt was incurred for any purposes binding on the defendants 2 to 4?

2. Whether defendants 2 to 4 have benefited by the suit debt ?

3. Whether the defendants 2 to 4 are liable to pay the suit debt from out of their 3/4 share of the family properties set out in schedule I of the petition for attachment before judgment.

4. Whether the defendants 2 to 4 are entitled to compensatory costs?

5. Whether the account maintained by plaintiff is true and correct ?

6. Whether the plaintiff is entitled to any interest ?

Additional issue :

1. Whether the suit debt is an *avyavaharika*' one as contended by defendants 2 to 4 in paras. 11 and 16 of their written statement?

5. The learned trial Judge found that the plaintiff's accounts were regularly kept and that the amount as claimed was due and payable. On issues 1 to 3 and on additional issue 1 he held that the suit debt was not an *avyavaharika* debt and that the fact that the father started a new business by himself would not militate against the entitlement of the creditor from recovering such a debt from all the members of the coparcenary, including the minor members. The learned Judge, however, did not notice that no suit notice was given prior to the action, and, in the end, he decreed the suit with costs. It is as against this the present appeal has been filed.

6. Mr. Soundarapandian, learned counsel for the appellants, does not dispute before us the quantum of liability of the first defendant, as the principal borrower. He, however, contends that though the first defendant was the father-manager of the coparcenary, yet as the family was essentially as agricultural family and not a trading family, the business started *suo motu* by the father cannot be accepted without further elucidation or evidence that it was carried on for the benefit of the minor members of the family, the appellants herein. He would also say that, as cotton trade involved speculation and as an agricultural family indulged in such a trade, the *prima facie* presumption is that such a new business cannot be deemed to be for the benefit of the minor coparceners and that, in that sense, the debt, though incurred in the course of such a trade, or dealing should be badged as an *avyavaharika* debt. He therefore disclaims liability on the part of the minor coparceners of the family. He also contends that the appellants are not liable for costs.

7. On the other hand, it is stated that it is not axiomatic that the starting of a new business by the father-manager of the joint family by itself raises a presumption that the debts contracted by him in the course of the running of such a business should always be held to be *avyavaharika* or non-binding debts, In so far as the non-issue of the notice of demand prior to the action is concerned, it is not disputed that no such notice was given to the minor defendants, though they were impleaded in the action, and that the notice said to have been issued to the first defendant was not even exhibited in the course of the trial.

8. In a joint family, which is a non-trading family, it is left to the option of the father-manager, as *patria potestas* of the family to formulate schemes of expansion in the matter of acquisition of property by lawful means and if, in the course of such wishful thinking, the father-manager departs from the usual avocation of the family and starts a new business as an *entrepreneur*, that by itself cannot be characterised as an activity of the father which is not contemplated in the personal law or against it. If such a business conducted by the father-manager is *ex facie* a speculative one or one which no reasonable or prudent person would characterise as a business undertaken by the father-manager in the interests of the other members of the family, then things might be different. But, on the only ground that the new business has been started by the father-manager, as a commercial activity thought of by him and for the purpose of prudentially conducting it for the benefit and welfare of his children and other coparceners of the family, that by itself would not raise any presumption, much less a reasonableg presumption that the debts contracted in the course of the working of such a commercial activity are by themselves *avyavaharika* debts. *Avyavaharika* is a concept which is peculiar to the personal law of the Hindus. It is not *avyavaharika*. The term "*vyavahara*" means "in the normal course". The opposite of '*vyavahara*' therefore should give an impression to a normal person that an abnormal activity was thought of by the father-manager or indulged in by him. For example, if an agricultural family, like the one under consideration, suddenly thinks of starting a gaming house with the intention of making profits thereon, though licensed under the provisions of the appropriate legislation, yet the very impression gained by a third party who is apprised of such an activity on the part of the father-manager, would be revolting, in the sense that he would adjudge such an activity as an *avyavaharika* activity or as abnormal activity. Each case has therefore to be decided on its own merits. In fact, there is high authority for the proposition that a trade is none-the-less ancestral, because itwas started only by the father. Vide *Achutaramayya* v. *Ratnajee Bhootaji*[1].

9. We should therefore consider the evidence let in this case to find out whether the father, who started the cotton business as an agriculturist, wanted to indulge in abnormal activities so as to prejudice the minor sons then born or thereafter to be born to him. D. W. 2 is the wife of the first defendant. She was examined as the guardian of defendants 2 to 4.

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1. (1926) I.L.R. 49 Mad. 211 ; 50 M.L.J. 208 : A.I.R. 1926 Mad. 323.

She says that for thirteen years her husband was doing cotton business, that he was a pious man and that he used to go to temples and spend moneys on charitable purposes. No doubt, there is the evidence of D. W. 1 who would, without hesitation, and without any basis either, attribute immoral activities to the first defendant. He would, however, honestly admit that he heard that the first defendant used to visit dancing girls' house. The learned trial Judge therefore discredited his testimoney as hearsay. Taking the evidence of D. W. 2 who is primarily interested in the minor defendants (appellants) we are unable to say that, when the father-manager started the new business thirteen years before, he contemplated to engage himself in abnormal or *avyavaharika* activities. It is not the case of D. W. 2 as the guardian of the appellants, that the first defendant was rash in the conduct of his business and that he was incurring loss ever-since, its inception. There is no evidence to that effect in this case. The overall picture gained by us is that the cotton business carried on by the first defendant was for the benefit of the family and that it was a new business which he *bona fide* started for the purpose of improving the finances of the family. In this connection, we may also refer to the decision of a Division Bench of this Court, consisting of Venkataraman and Gokulakrishnan, JJ., in *Rajan* v. *Kannikonda Reddiar*[1], where the learned Judges observed that the starting of a new business (in that case a bus business) could not be called *avyavaharika* and that the sons would be liable to pay the debt incurred for the business on the pious obligation theory.

10. For these reasons we are unable to agree with Mr. Soundarapandian that the debt is tainted and that the appellants as minors are not liable to contribute to the same. The learned trial Judge rightly came to the conclusion that the debt was binding on defendants 2 to 4 and that they were also liable to pay the debt from and out of their share in the joint family properties.

11. The only surviving question is whether the appellants should suffer costs in this action. We have already referred to the fact that there was no notice before the suit which was given to the minor defendants in the action, though they were impleaded as such. Even the notice said to have been given to the first defendant has not been filed. No explanation is forth-coming as to why it has not been produced. In these circumstances, we are of the view that the appellants have rightly come up to this Court at least to challenge the decree for costs given by the Court below. As regards the costs awarded by the Court below, we are of the view that defendants 2 to 4 need not be directed to pay the counsel 's fee which was made part of the decree, as a result of the decree for costs given against all the defendants. In this appeal, therefore, while dismissing the same, we direct that there will be no order as to costs in favour of the plaintiff-first respondent.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C J. and S. Natarajan, J.*

Y. Venkanna Choudary .. *Appellant**

v.

Government of India, by Military Estates Officer, Madras-9 and another .. *Respondents.*

(A) *Madras Requisition and Acquisition of Immovable Property Act (XLII of* 1956), *section* 11—*Requisition of land under the Act—Arbitrator determining compensation —Appeal by landowner—Court-fee payable on Memorandum of Appeal.*

(B) *Madras Court-fees and Suits Valuation Act (XIV of* 1955), *section* 51.

As regards requisition and acquisition of immoveable property, the concepts of requisitioning and acquisition are distinct

1. (1975) 1 M.L.J. 26 : 88 L.W. 205 : A.I.R. 1975 Mad. 117.

* A.A.O.S.R. No. 68137 of 1971.
18*th March,* 1975.

and different with different results and the quantum of compensation *vis a vis* section 8 of the Madras Requisition and Acquisition of Immoveable Property Act may also be not identical. The object of the Court-fees Act is to assess Court-fee on certain principles and, so far as compensation is concerned, the *ad valorem* rate applies to a memorandum of appeal relating to such a claim. Acquisition is a very broad term which may result in deprivation of property in the sense that the title itself is extinguished and vested in the acquiring authority. The word "acquisition" in section 51 is used in the proper sense of taking which may mean any one or more of the elements, which as a bundle constitute property. So long as the power of getting at property is in exercise of the power of eminent domain, it does not matter for the purpose of section 51, whether it is the prime domain on the property or any part or element which goes into the concept of property as generally. Therefore section 51 of the Court Fees Act covers the Memorandum of Appeal which relates to compensation for requisitioning of property.

[*Paras*. 2 *and* 3.]

Cases referred to :—

Ramachandran v. *State of Madras*, (1974) 2 M.L.J. 313 ; *S.G. Bhagade* v. *Special Deputy Collector, Ahmednagar*, (1971) 1 S.C.J. 717: (1971) 1 S.C.R. 146: A.I.R. 1971 S.C. 1887.

Appeal sought to be preferred to this Court against the decree of the Court of the Arbitrator (District Judge), Chingelput dated 30th June, 1971 and made in A.C.No. 1 of 1971.

R.G. Rajan, for Appellant.

The Advocate-General assisted by the Government Pleader, for Respondents.

The Order of the Court was made by

Veeraswami, CJ., :—The matter is placed before us by the Master for a decision on the proper Court-fee payable on the memorandum of appeal. The appellant's land was requisitioned under the Requisitioning and Acquisition of Immovable Property Act, 1952. Aggrieved by the alleged inadequacy of compensation under section 8 as determined by the Arbitrator, the appeal has been preferred under section 11. The contention is that as this Act makes a difference between requisitioning and acquisition, it should be borne in mind in determining the scope of section 51 of the Tamil Nadu Court-fees and Suits Valuation Act.

2. Section 3 of the Requisitioning Act provides for the power to requisition any immovable property and on such requisitioning, the appropriate authority can under section 4 take possession. Rights over the reqiusitioned property are defined by section 5. Release from requisitioning is made under section 6. Where the property requisitioned needs to be acquired for a public purpose, power therefore is found in section 7. Section 8 provides the principles and method of determining the compensation and in this section no difference is made between requisitioning and acquisition, though clause (*c*) of sub-section (1) does refer to the property requisitioned or acquired. Section 11 which provides for appeals is common to both compensation for requisitioning and acquisition. It is clear therefore that, so far as the Requisitioning and Acquisition of Immovable Property is concerned, the concepts of requisitioning and acquisition are distinct and different with different results and the quantum of compensation *vis a vis* section 8 may also be not identical.

3. But the question is whether this difference, as is contended for, should be carried into section 51 of the Court-fees Act. In our opinion, there is no warrant for it. The plain dictionary meaning of acquisition as given in the Shorter Oxford Dictionary is "come into possession of". The object of the Court-fees Act is to assess Court-fee on certain principles and, so far as compensation is concerned, the *ad valorem* rate applies to a memorandum of appeal relating to such a claim. Is there any substantial reason why for purposes of assessing Court-fee, compensation for requisitioning and that for acquisition should be treated differently? As far as we are able to see from the standpoint of Court-fee on a memorandum of appeal, no justification on any conceivable ground presents itself for acceptance. The section deals with compensation in respect of acquisition of property for public purposes. Acquisition is a very broad term which may comprehend within

itself were taking of possession or short of it, for use as in the case of a licence, or it may result in deprivation of property in the sense that the title itself is extinguished and vested in the acquiring authority. The word acquisition in section 51 in our opinion is used in the proper sense of taking, which may mean any one or more of the elements, which as a bundle constitute property. So long as the power of getting at the property is in exercise of the power of eminent domain, it does not matter for purposes of section 51, whether it is the prime domain on the property or any part or element which goes into the concept of property as generally understood. We are therefore inclined to think that section 51 of the Court-fees Act covers the memorandum of appeal which relates to compensation for requisitioning of property.

4. It is argued for the appellant that though the Requisitioning and Acquisition of Immovable Property Act speaks of compensation for requisitioning, in fact, such compensation is but rent and therefore the proper section in the Court-fees Act to be applied is section 43. We are unable to accept this stand because requisitioning under the Act does not involve bringing into existence the relationship of landlord and tenant. Section 43 therefore cannot be applied to the appeal memorandum.

5. Our attention was invited to *Ramachandran* v. *State of Madras*[1] a decision of a learned single Judge of this Court. But that case did not decide the point which we are called upon to settle. It is one on a different basis. So too *S.G. Bhagade* v. *Special Deputy Collector, Ahmednagar*[2], is not of assistance in deciding the above point.

6. It is true that this Court has struck down Article I schedule I of the Court-fees Act as invalid in a recent judgment. But, at the moment, what will be the quantum of fee that will be payable, we are not concerned with. All that we hold at the moment is that section 51 of the Court-fees and Suits Valuation Act applies to the appeal memorandum.

R. S. ——— *Appeal dismissed.*

1. (1974) 2 M.L.J. 313.
2. (1971) 1 S.C.J. 717: (1971) 1 S.C.R. 146: A.I.R. 1971 S.C. 1887.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

R. Selvaraj .. *Appellant**

v.

R. Radhakrishna Pillai *alias* **R. R. Krishna Pillai and another** .. *Respondents.*

(A) *Hindu Law—Joint family—Photo business—Allegedly started by ancestor—Father also carrying on same business—Business whether joint family business—Presumption.*

(B) *Hindu Law—Doctrine of blending.*

(C) *Deed of release—Not registered—Admissibility.*

It is not every sporadic or unimpressive contribution by a member of the joint family, may be the father, that would make the resultant activity, a joint family activity. The contribution of labour, service or money by one member of the joint family to the other should be so conspicuous and impressive that on a *prima facie* examination of such material, a reasonable and prudent person should gain the impression that the two members were so associated with the common object of exploiting a commercial activity to the advantage of the joint family as a whole and in general. In the absence of such essential features, which would make such contribution by one member to the other a commercial activity the intendment and purpose of which is to make it a joint family trade, it is hazardous to infer that such unisoned activity between the members would be equated to a co-ordinated activity on their part equatable to the activity of members of a Hindu joint family resulting in the properties acquired by such common exertions joint family properties. [*Para.* 8.]

*A.No. 773 of 1969 and C.M.P. No. 11427 of 1973.

21st March, 1975.

There is no presumption that a business conducted by a member of the joint family is a joint family business. On the other hand the presumption is to the contrary. The person alleging such a state of affairs should prove the same by acceptable and clinching evidence. The fact that the business started by one of the members was of the same nature as the business which was carried on by his ancestors will not by itself be a sufficient discharge of the burden of proof on the part of the person alleging that such business is ancestral business. [*Para.* 13.]

The doctrine of blending of self-acquired property with joint family property has to be carefully applied with reference to the facts of each case. No doubt when members of a joint family by their joint labour or in their joint business acquired property, that property, in the absence of a clear indication of a contrary intention, would be owned by them as joint family property and their male issue would necessarily acquire a right by birth in such property. But the essential *sine qua non* is the absence of a contrary intention. If there is satisfactory evidence of an intention on the part of the acquirer of such property to treat it as his own, but not as joint family property, the presumption which ordinarily arises, according to the personal law of Hindus that such property would be regarded as joint family property, will not arise. [*Para.* 12.]

Admissions in an unregistered release deed is evidence to prove the same and particularly to establish that some of the properties covered by it are self-acquisitions of one of the executants of the same. [*Para.* 16.]

Cases referred to:—

Sundaram v. *Rukmani Ammal*, (1974) 2 M.L.J. 354; *Sudarsanam Maistry* v. *Narasimhulu Maistry*, (1902) I.L.R. 25 Mad. 149: (1902) 2 M.L.J. 353 ; *Rajangam Ayyar* v. *Rajangam Ayyar*, (1920) 39 M.L.J. 382: 12 L.W. 435: 57 I.C. 18; *Lakkireddi Chinna Venkata Reddi* v. *Lakkireddi Lakshmamma*, (1964) 2 S.C.R. 172: (1964) 1 S.C.J. 45: (1964) 1 M.L.J. (S.C.) 21: (1964) 1 An. W.R. (S.C.) 21: A. I.R. 1963 S.C. 1601.

Appeal No. 773 *of* 1969 : Appeal against the decree of the Court of the Subordinate Judge of Nagapattinam dated 24th December, 1968 and passed in Original Suit No. 3 of 1968.

C.M.P. No. 11427 *of* 1973: Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to admit the documents mentioned hereunder as additional evidence in the said Appeal No. 773 of 1969 (1) the Certificate dated 21st November, 1968 issued by Thiru S.A. Sundaresan, III Presidency Magistrate, Madras in favour of the petitioner herein (2) The certificate dated 21st November, 1968 issued by Thiru K. Syed Ibrahim, Member, Public Service Commission, Madras, in favour of the petitioner herein.

R. Sundaralingam and *K. Jayaraman*, for Appellant.

K. Sarvabhauman and *T.R. Mani*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The unsuccessful plaintiff in O.S.No. 3 of 1968 on the file of the Court of the Subordinate Judge of Nagapattinam, is the appellant. Originally the suit was numbered is O.S. No. 42 of 1967 on the file of the Court of the District Judge, East Thanjavur at Nagapattinam. The suit is one for partition and separate possession of the plaintiff's one-third share in the suit properties and for future profits. The plaintiff's case is that his paternal grand-father Rajagopal Pillai started a photo business in 1917 under the name and style of Sri Krishna Photo Studio. The first defendant is the plaintiff's father and the second defendant is the step-brother of the plaintiff. It is claimed that the first defendant got himself associated with his father in the photo business and both of them ran it as a joint family business. When the grandfather Rajagopal Pillai became old, the first defendant was in sole charge of the studio and the business and the plaintiff after completing the school course, participated in the same and contributed his labour also. Thus, the family photo business was continued after the death of Rajagopal Pillai in 1965 and considerable

properties were acquired from and out of the profits of the business. The plaintiff says that he became an expert in the said business and the grand-father himself till his death was doing the sedentary part of the business. As the joint family had no other business or source of earning except the photo studio, the plaintiff acquired a right by birth in the family activity and the assets secured in exercise of such profession. The family acquired the house in which the studio is at present situate besides agricultural lands of an extent of 6.80 acres in Serukudi village from and out of the business profits. It is claimed that large sums of money have also been deposited by the first defendant in his name in various banks. Soon after the death of the grand-father there were misunderstandings between the plaintiff and the first defendant, who was under the influence of his second wife and by the end of April, 1967 the bickerings compelled the plaintiff to demand a division of the joint family properties and allotment of his one-third share to him. The plaintiff also refers to a partition in the family to which he was a party but claims that it is an unstamped and unregistered document and, therefore, would not bind him. As the first defendant refused to effect any proper division of the properties and give his one-third share, though such a demand was made through mediators, he had to file the present action claiming a one-third share in the plaint A to D schedule properties. A schedule properties deal with the materials in the photo studio; B schedule refers to a house in Thiruvarur town. C schedule deals with the agricultural lands and the D schedule refers to a deposit of a sum of Rs. 10,000 made by the first defendant in the Indian Overseas Bank at Thiruvarur.

2. In the first defendant's written statement he admits that the plaintiff was living with him till April, 1967. Thereafter the plaintiff was living separately with his wife. It is denied that the photo studio called Sri Krishna Photo Studio is a joint family business and the properties mentioned in the various schedules to the plaint are joint family properties. Rajagopal Pillai, the grand-father of the plaintiff was a public servant employed as a clerk in the Sub-Registrar's Office in the first instance and later in the railways. Rajagopal Pillai thereafter started a business in watch and clock repairs and later learnt photography and was carrying on a mere photography business at Nagapattinam and Thiruthuraipundi and was not even successful. He was adjudicated as an insolvent and the first defendant emphatically denies that there were any ancestral nucleus left by Rajagopal Pillai for the first defendant to exploit the same. The first defendant's independent case is that he was trained by one G. V. Naidu, photographer of Nagapattinam and he became proficient in it. With a paltry sum of Rs. 130 given to him by his maternal uncle, he purchased a camera and carried on the profession as a photographer at Thiruvarur. Thereafter he started a photo studio of his own at Thiruvarur and with the funds provided by his paternal aunt, he opened the studio Sri Krishna photo studio on 19th February, 1931. Thereafter he had to borrow some moneys for purchases of cameras and equipment and thus, no funds were provided by his father and no photographic equipment was inherited by him to continue the so-called photographic business of Rajagopal Pillai, the grand-father of the plaintiff. Thereafter, this studio was shifted to a pucca building and with the borrowings made from third parties and banks, the first defendant continued his own separate studio business as the proprietor thereof. In course of time, he improved the business and began to deal with the photographic materials and earning income therefrom. He lent moneys on mortgages and purchased immovable properties mentioned in the schedules and they are his sole and separate properties. The house and the agricultural lands are not joint family properties and the plaintiff has no interest or right by birth in them. The allegation that the plaintiff assisted his grand-father as well as the first defendant in conducting the alleged photographic business started by Rajagopal Pillai in 1917 is denied. The plaintiff if at all was writing some accounts and beyond that no contribution was made by the plaintiff in acquiring the schedule mentioned properties. The bank deposit of Rs.10,000 is denied. The first defendant also refers to some mediation at the instance

of respectable persons and the fact that a draft partition deed was drawn up whereunder the first defendant was prepared to give the plaintiff an ex-gratia sum of Rs. 4,501 and five mas of land so that the plaintiff could live upon it and maintain himself. The first defendant also refers to a release deed which the plaintiff had to execute incorporating the terms agreed upon during the course of mediation. Though the plaintiff signed a copy of such deeds and affixed his signature thereto, he wriggled out of the situation and at the instance of his friends, has filed this suit on false allegations. The plaintiff's claim of one-third share in the schedule mentioned properties is denied.

3. In the reply statement, the plaintiff reiterates his position and repudiates the circumstances under which the unstamped document was signed by him.

4. On the above pleadings, the following issues were framed:

1. Whether the 'Sri Krishna Studio' is the joint family business of the parties?

2. Are all the properties concerned the joint family properties?

3. If issues 1 and 2 are found in favour of the plaintiff, are the jewels items 1, 3, 4, 8, 9, 11 and 12 in the inventory list, the properties of the first defendant's second wife belonging to her exclusively as her stridhana properties?

4. What are the movables and furnitures available for division?

5. Is the document dated 29th April, 1967 invalid and inoperative as is contended by the plaintiff?

6. To what relief is the plaintiff entitled?

5. The learned Subordinate Judge found on issue No. 1 after detailed consideration of the oral and documentary evidence that the association of the plaintiff in the business of the first defendant was only out of generosity and kindness and in the course of the conduct of a dutiful son towards his father and that the plaintiff could have assisted the first defendant in the matter of writing accounts etc. only on and after he completed his school in 1956, and there has not been a blending of the properties of the first defendant with the joint family properties if any, and that the Sri Krishna Studio is not the joint family business of the plaintiff and the 1st defendant. Consequent upon his finding on issue No. 1, the learned Judge did not agree with the plaintiff's case that the other properties mentioned in the schedules could be treated and considered as joint family properties on the legality and the admissibility of Exhibit B-75, which is the unregistered release deed to which the plaintiff was a party and found that the plaintiff was not speaking the truth and that Exhibit B-75 is a true document. But he would not base his conclusion on it fully, as it was an unregistered one. He looked into it for certain purposes and ultimately held that the plaintiff was not entitled to any partition and share of the properties.

6. The plaintiff has come up in appeal.

7. Sri Gopalaswamy Iyengar, repeated the contentions made in the lower Court and contends that the material before us is sufficient to hold that Sri Krishna Photo Studio was originally started by the grandfather and that the subsequent accretions made by the plaintiff's father by continuing the said business should be deemed to be joint family property in which the plaintiff has a legitimate share. Mr. D. Ramaswamy Iyengar learned counsel for the respondent would, however, say that the plaintiff should fail on his own evidence and in any event no connecting link has been shown by the plaintiff to establish the continuity of an ancestral business which is the essential *sine qua non* to prove ancestral nucleus and to further establish that the properties acquired by a male member from the income of such alleged joint family activity should also be considered as joint family properties. In the main his contention is that all the properties claimed by the plaintiff as joint family properties are the self-acquisitions of the first defendant in which the plaintiff cannot claim a share.

8. The foundation of the appellant's case is that it was the grand-father Rajagopal Pillai, who started the photo studio and the ancillary photographic business. If this basis or hypothesis on which the edifice of this argument is built, is taken out, then the plaintiff should naturally

fail. Rajagopal Pillai was a Government servant. He was working in the Sub-Registrar's office for sometime, and later on in the railways. He was for sometime doing business in watch repairs. Thereafter he got a camera on a hire purchase and was taking photos. He was later adjudicated insolvent in 1927. This by itself is sufficient to discredit the story of the plaintiff as well as his witnesses that there was ancestral nucleus left by Rajagopal Pillai for the first defendant to continue the same. Exhibit B-90 is the insolvency petition. Exhibit B-91 is the affidavit filed by Rajagopal Pillai pleading inability to pay his debts. Exhibit B-92 is the application for discharge, which was pending till 30th October, 1928. The final order of discharge was made directing Rajagopal Pillai to deposit a sum of about Rs. 25 for distribution amongst his creditors and he was given six months time for payment. It is, therefore, seen that Rajagopal Pillai was unble to make both ends meet even in 1928, as he could not pay the sum of Rs. 25 in one lump sum and he wanted six months time for payment of the same. Rightly, therefore, the lower Court stated that it would be unwise to comprehend that Rajagopal Pillai was conducting a photo studio during 1927 and 1928 and that too at Thiruvarur, a place not mentioned in Exhibits B-90 and B-92. It was only in 1931 that the first defendant started his own photo business. There is no link to prove that the grand-father provided the father of the plaintiff with funds during 1929 and 1930 to enable the father to start a photo studio business at Thiruvarur in 1931. When the first defendant started his studio in 1931, it may be that Rajagopal Pillai was assisting him. When Rajagopal Pillai associated himself with his son's new photo business at Thiruvarur, proclaiming that his son was the proprietor of the concern, that is sufficient admission on the part of Rajagopal Pillai that he had nothing to do with the new photo business started by his son. Exhibits B-2, B-48 to B-59 establish that the grand father admitted that he was receiving only a salary of Rs. 25 or Rs. 35 as an employee in the photographic business of his son. The conduct of Rajagopal Pillai throughout gives the lie direct to the plaintiff's case that Rajagopal Pillai was the author of Sri Krishna Studio, Thiruvarur and that his association with the said business of which the first defendant was the proprietor was in the status of a member of an undivided joint family. The plaintiff did not let in any evidence to show that the grand-father handed over at least a camera to the first defendant as an undischarged insolvent or after discharge for him to continue the so-called joint family business. The contention, however, is that the grand-father was also interested in his son's business and that he contributed sufficient labour for raising a presumption that there was a joint family activity. It is not every sporadic or unimpressive contribution by a member of the joint family, may be the father, that would make the resultant activity, a joint family activity. The contribution of labour, service or money by one member of the joint family to the other should be so conspicuous and impressive that on a *prima facie* examination of such material, a reasonable and a prudent person should gain the impression that the two members were so associated with the common object of exploiting a commercial activity to the advantage of the joint family as a whole and in general. In the instant case, the grand-father was writing accounts acknowledging that the father was the sole proprietor of the Thiruvarur photo business. The grand-father also accepts that he was receiving a salary for such service rendered. The surrounding circumstances also belie the tall story of the plaintiff that the grand-father and the father so associated themselves so as to make their joint activity a joint family venture. In the absence of such essential features, which would make such contribution by one member to the other a commercial activity the intendment and purpose of which is to make it a joint family trade, it is hazardous to infer that such unisoned activity between the members should be equated to a co-ordinated activity on their part equatable to the activity of members of a Hindu joint family resulting in the properties acquired by such common exertions as joint family properties.

9. In *Sundaram* v. *Rukmani Ammal*[1], Ramanujam and V. Ramaswami, JJ., hinted as to what should be the nature of such assistance which a member of a Hindu joint family should render so as to make him also the joint owner of the properties secured by such co-ordinated activity. They said :

> " Where a business was in its origin the exclusive business of the father, whether that business came to acquire a joint family character would depend on the nature of the help or assistance given by the son. It is not every act or work done or assistance given by a son to the father in the conduct of the business that will make the business a joint family business. If the work done or assistance given by the son is such as to lead to the inference that the father had intended to treat his exclusive business as a joint family business, then alone the presumption of joint business could be invoked. In invoking such a presumption the joint exertion by the son with his father should be such that the father could be said to have intended to treat the business as belonging to both, or to the joint family."

In the instant case, we have no evidence to assume or presume that the nature of the assistance rendered by Rajagopal Pillai to the first defendant after he was discharged as an insolvent was such as to lead to the necessary inference that the first defendant intended to treat his exclusive business as a joint family business. On the other hand, we have referred to the salient features in this case that the first defendant maintained his individuality and proprietorship over the business and even the grand-father Rajagopal Pillai acknowledged such a right in his son. *A fortiori* therefore, the plaintiff as the grandson cannot ignore such essential features in the case and claim that the business is a joint family business.

10. The plaintiff, however, wants to take advantage of certain advertisements made by his father to show that Krishna Photo Studio, Tiruvarur, is but a continuation of the quondam business of Rajagopal Pillai. Exhibit A-1 is an advertisement notice which shows that Krishna Photo Studio, Thiruvarur, was established in 1917. To the same effect are Exhibits A-2 and A-3. The lower Court rightly condemned these documents by examining them physically. We are also satisfied that these Exhibits could not have been printed in 1917. In that year no one comprehended the existence of a road named after Netaji. In fact, there was no such road in Thiruvarur as Netaji road as early as 1917. The first defendant explains these exhibits by saying that he adopted an advertisement puff to the effect that he started the business in 1917 so that he could compete with other rival photographers. We are not, therefore, satisfied that Exhibits A-1, A-2 and A-3 conclusively establish that there was a continuity of the joint family business by the first defendant when he started his studio at Thiruvarur. The plaintiff again relies upon Exhibits A-5 and A-6. They are written to third parties including P. W. 3. Exhibit A-6 bears a rubber stamp of Sri Krishna Studio Photographer, Thiruvarur. The letter is dated 28th March, 1930. The plaintiff wants to build up a case that this by itself establishes that the first defendant was continuing his father's business. Exhibits A-5 and A-6 do not contain any reference to such business. The plaintiff relies upon the rubber stamp impression on the letters. It would be unsafe to rely upon them for, as pointed out by the learned Judge, those impressions could easily be got affixed later by interested parties. The plaintiff also relies upon the evidence of P. W. 3, who is a relative, anxious to help the plaintiff. Exhibit A-7 is a photograph in which P. W. 3 and his relations are seated. According to P. W. 3 it was Rajagopal Pillai, who took the photograph in 1924. Exhibit A-7, as such does not disclose that the photograph was so taken. Even otherwise P. W. 3 says that the two children found in Exhibit A-7 would now be aged about 35 and 33. It, therefore, follows that the photo ought to have been taken only after 1933 and not in 1924 or before 1928. It is not clear from Exhibit A-7 whether Rajagopal Pillai was having a studio by name Sri Krishna Photo

1. (1974) 2 M.L.J. 354.

Studio in 1924. The manuscript writing on the photograph cannot be relied upon for the purpose. To a similar effect is another photograph Exhibit A-8, which does not mention that it was taken in the year 1938. The testimony of P. W. 3 is belied by the fact that he has no personal knowledge as to whether the studio was in existence in the year 1924. In fact, till 1928 Rajagopal Pillai was at Thiruturaipundi where his insolvency proceedings were pending. It is, therefore, unnatural and possibly unlikely that he would have continued his photographic business in 1928, when he was adjudicated an insolvent by then. P. W. 3 and the first defendant were not on amicable terms ever since 1933 and he appears to be a competitor in the trade. His evidence to the effect that he learnt photograph from Rajagopal Pillai and purchased a camera from him are all to be considered in the above light and particularly when he is not favourably disposed towards the first defendant. P. W 3's. testimony, therefore, does not further the plaintiff's case. P. W. 4 is another person, who was not on talking terms with the first defendant for 10 years and it is in this predicament he comes to help.

11. Thus, we notice that the plaintiff's witnesses who have been deliberately brought for the occasion do not further the case of the plaintiff. Photographic art is out and out objective, though it is the product of subjective entrepreneurship. A keen intellect, a perceptive aesthetic taste, an open mind and creative art are all the essential characteristics of photography. The introvertic content of photography is something which cannot be measured by any yardstick of conception but it is a variable norm mostly reflecting the prowess of the artist himself. These essential elements in the art of photography have to be acquired or at least shown to have been acquired by a person before he claims to be an expert successful photographer. The plaintiff has miserably failed to establish that his association with the family is such as to gain the impression that he is a photographer himself of that eminence and merit and that his grand-father put his father into the limelight by injecting in the first defendant the above elements for us to conclude that there was any continuity in the photographic business or for the matter of that photographic trade.

12. *Sudarsanam Maistry* v. *Narasimhulu Maistry*[1], is relied upon by Mr. Gopalaswamy Iyengar. Their Lordships said:

> "Even if the undivided family is not possessed of any nucleus of property which has come to it as 'unobstructed heritage', it may be that, by act of parties property acquired jointly by all the members or separately by one or more members thereof, can be impressed with the character and incidents of unobstructed heritage or joint property belonging to the main family or to any of its branches."

But the evidence in this case does not support the above well-accepted proposition. No act of the first defendant has been brought to our notice so as to establish that the first defendant intended to do the photographic business and trade so as to hold the same and the accretions made thereunder as joint family property in the Mitakshara sense of that expression. We have already stated that the labour contributed by the grand-father does not give any indication of any intention on the part of the first defendant to treat the business and the additions from its income as joint family property. There has not been such blending of the properties acquired by the first defendant as is required in Hindu Law so as to impress such properties with the badge of joint family properties. The doctrine of blending of self-acquired property with joint family has to be carefully applied with reference to the facts of each case. No doubt it is settled that when members of a joint family by their joint labour or in their joint business acquired property, that property in the absense of a clear indication of a contrary intention, would be owned by them as joint family property and their male issue would necessarily acquire a right by birth in such property. But the essential *sine qua non* is the absence of a

1. (1902) I.L.R. 25 Mad. 149 : (1902) 2 M.L.J. 353.

contrary intention. If there is satisfactory evidence of an intention on the part of the acquirer of such property to treat it as his own, but not as joint family property, the presumption which ordinarily arises, according to the personal law of Hindus, that such property would be regarded as joint family property, will not arise. Certain incidents may be cited to prove that the first defendant did not subordinate his individuality or give up his right as owner of the acquired properties so as to raise a presumption that he desired to treat these properties as joint family properties.

13. However, one such incident relied upon is the writing of accounts of Sri Krishna Photo Studio by Rajagopal Pillai. Such occasional offers by the grand-father to render service to the father after he was discharged as an insolvent cannot be put in the forefront to show that Rajagopal Pillai associated himself with the son so as to make the activity of the first defendant a joint activity. It may be that the first defendant as a dutiful son allowed his father to help him in his business during the early part of its commencement. We have already referred to the fact that Rajagopal Pillai himself was paid a salary of Rs. 25 per month as is seen from Exhibits P-60 to 69. Exhibits B-48 to B-59 are letters written by the grand-father to various persons to intervene on his behalf and request the first defendant to send a sum of Rs. 30 per month. The one other incident referred to by the plaintiff is his own contribution to the business. That he has experience in photography is vaguely referred to by P. Ws. 2 and 5. It may be that the plaintiff is interested in photography. But the question is, whether he rendered assistance to his father and contributed his labour to set up a case that the business as well as the properties acquired from the surplus income, are joint family properties. He did not receive any salary or any remuneration from the first defendant. He also assisted his father during his spare time by writing a few entries in the accounts. Even such association by the plaintiff would not make the commercial activity of his father a joint family business. A conscious, voluntary abandonment by the first defendant of his separate rights in the business should be established. He might have taken some photographs on some occasions. He might have proficiently as a photographer as is seen from Exhibit B-70 which is the advertisement given in The Hindu to show that he is an experienced photographer. But all such sporadic acts and exhibitions of proficiency cannot make the business of the father a joint family business. The well-established principles as is seen from the pronouncements of the Supreme Court and our High Court is to the effect that there is no presumption that a business conducted by a member of the joint family is a joint family business. On the other hand the presumption is to the contrary. The person alleging such a state of affairs should prove the same by acceptable and clinching evidence. The fact that the business started by one of the members was of the same nature as the business which was carried on by his ancestors will not by itself be a sufficient discharge of the burden of proof on the part of the person alleging that such business is ancestral business. Even if it is assumed that the first defendant out of his generosity associated for certain purposes the plaintiff and put him in administrative charge of a part of his affairs, it does not tantamount to a relinquishment or abandonment of his exclusive rights in his business and conversion of his separate business into joint family business. Even if the first defendant trained the plaintiff for acquisition of the necessary knowledge as a photographer that would not be a telling feature to prove blending or intentional abandonment of his exclusive rights in the photographic business and trade. One other feature very strongly relied upon by the plaintiff is that when the account book was opened by the first defendant on 19th February, 1931 in the name of Sri Krishna Photo Studio, a sum of Rs. 379-11-0 was credited towards the photographic charges from customers. When the business was started on 19th February, 1931 the entry as if a sum of Rs. 379-11-0 is due from customers indicates that there was a continuity of an old business. The learned Judge on a careful consideration of the entries in Exhibit B-2 which contained the above

entry also rightly held that it represents the amount due by way of charges for photographs taken on that date. It is not unlikely that a credit is shown on that date for services rendered by the photographer to his customers. Invariably a business man would try to boost up his business. Apparently on such anxiety, the first defendant might have made these entries on the very date when he started the business. The first defendant, however sent some old bill books containing the bill numbers which are not continuous. The first defendant explains the position by saying that the order forms were loose sheets got from another photographer.

14. Though this explanation is not fully supported by evidence, yet this sporadic instance cannot belie the first defendant's case. The facts of this case establish that Rajagopal Pillai, who became an insolvent just about two or three years prior to the opening of the business by the first defendant, could not have had such custom on 19th February, 1931 for him to transmit the same to the first defendant. This again is a factor, which has to be taken into consideration, as was rightly done by the Court below. There is again a credit entry of Rs. 375 in Exhibit B-2. The first defendant explains this entry as a sum borrowed from his paternal aunt. The plaintiff's case is that this credit entry represents the value of the camera and other materials, which Rajagopal Pillai might have given to the first defendant on the date when he started the new accounts. There is absolutely no evidence to show that Rajagopal Pillai was possessed of such photographic implements for him to pass them on to his son. There was no such disclosure in the insolvency proceedings. The argument on behalf of the plaintiff that these are the assets which the first defendant obtained from his father is without any basis whatsoever.

15. On the other hand, the evidence of the first defendant is more acceptable. He speaks to the fact that he went over to his maternal grand-father's house at Veliapalayam when he was 1½ years old and was living with his uncle and not with his father. It was only when he was aged about six he became acquainted with his own father. He speaks about the insolvency proceedings in which his father was adjudicated as an insolvent. He is emphatic that he did not visit his father at Nagapattinam when he was seeking his livelihood as a photographer and that he did not learn photography under him, since the father did not care for him. He says that prior to his opening of his business in Thiruvarur, his father came of his own accord and took up residence with him and it was during that period of stay that Rajagopal Pillai was asked to assist him in writing accounts. He denies the suggestion that his father started the photo business in 1917 and that his father was partaking in the business throughout. He refers to the fact that from and out of the surplus income, he purchased the suit schedule properties. He says that his son stopped his education in October, 1956 when he was 17 years old, that he was unable to pick up the art of photography. He says that the plaintiff was occasionally looking after his business when he was not well. He refers to Exhibit B-75 a release deed, executed by the plaintiff, which emphasises his proprietorship in the business of Sri Krishna Photo Studio. The testimony of D. W. 1 and his witnesses read with the provisions of the Hindu Gains of Learning Act, prompts us to accept the first defendant's case. Prior to 1930, when the above Act was passed, the common notion was that all such gains of learning of a member of a joint family by the practice of a profession or occupation at the expense of joint family property was to be treated as joint family property and if such gains were made by personal labour without reference to the joint family funds, they were the self-acquired property of the said member. But after the passing of the Act, no gains of learning shall be held not to be the exclusive and separate property of the member of the joint family on the only ground that such learning was imparted to him at the expense of joint family funds and with its aid. The fact that during the acquisition of such knowledge and learning the concerned member of the family was maintained by the joint funds of his family will not matter. Under the provisions of the

Hindu Gains of Learning Act also, the first defendant's theory that all the acquisitions made by him and referred to by the plaintiff in the pleadings are his self-acquired property, has to be accepted. The plaintiff himself has subscribed unambiguously to the fact that his father was the proprietor of Sri Krishna Photo Studio as is seen from Exhibit B-75 which we shall presently consider. That there was no ancestral nucleus has been proved. The plaintiff was not even born when his father started his business. It is impossible to believe that the plaintiff contributed to the commercial activity of his father to such an extent so as to give the impression that the father voluntarily divested himself of his right over his business and the properties acquired therefrom as sole proprietor and sole owner thereof.

16. We shall now deal with Exhibit B-75. This is an unregistered release deed dated 29th April, 1967 executed as between the plaintiff on the one hand and the first defendant on the other. The plaintiff would say that he signed it under coercion and compulsion. He has two versions to give. The first one is that he signed the same voluntarily because of his confidence in his brother-in-law, who intervened in the matter. His second version is that he signed it without reading the contents. He admits the presence of independent persons at the time when Exhibit B-75 was executed. Taking all the circumstances under which Exhibit B-75 came into existence, we are unable to accept the self-serving evidence of the plaintiff that he was compelled to execute the release deed. D.W.10 is one of the witnesses, to such execution. D.W. 7 is the Vakil's clerk, who was present throughout, when the deed was prepared under instructions from both the plaintiff and the first defendant. D.W.7, would swear that the plaintiff was informed that after the release, he was free to carry on the photo business by himself excepting in the name of Sri Krishna Photo Studio. The first defendant has categorically referred to the fact that Krishna Photo Studio and the properties purchased by him from its income are his self acquisitions. Whilst holding therefore, that Exhibit B-75 should have been executed in the manner and at the time as suggested by the first defendant, we apply the principle that admissions in an unregistered deed is evidence to prove the same and particularly to establish that some of the properties covered by it are the self-acquisitions of one of the executants of the same. This principle is referred to in *Rajangam Ayyar* v. *Rajangam Ayyar*[1]. As in our opinion Exhibit B-75 is a true document, the recitals therein that the photo studio is a self-acquired property of the first defendant has to be given sufficient weightage and effect and even on this ground, the plaintiff's case that the suit properties are joint family properties fails.

In conclusion, we recapitulate the principle as laid down by the Supreme court in *Lakkireddi Chinna Venkata Reddi* v. *Lakkireddi Lakshmamma*[2]. The Supreme Court said :

> " Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein. To establish such abandonment, a clear intention to waive separate right must be established. From the mere fact that other members of the family were allowed to use the property, jointly with himself or that the income of the separate property was utilised out of generosity to support persons, whom the holder was not bound to support or from the failure to maintain separate accounts, abandonment cannot be inferred for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation. "

The above principle squarely applies to the facts of this case. We have, therefore, no hesitation in agreeing with the findings of the Court below on all the issues. We are not traversing the few facts in relation to the other issues, as they were not

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1. (1920) 39 M.L.J. 382 : 12 L.W. 435 : 57 I.C. 18.
2. (1964) 1 S.C.J. 45 : (1964) 1 M.L.J. (S.C.) 21 : (1964) 1 An.W.R. (S.C.) 21 : (1964) 2 S.C.R. 172 : A.I.R. 1963 S.C. 1601.

seriously argued before us. As no arguments were addressed before us challenging such findings on such issues the appeal fails and it is dismissed. But as it is a litigation between the father and son and as the son has come to Court with an unreasonably wide open mouth as against his own father, we do not feel inclined to award costs. There will be no order as to costs.

C.M.P.No. 11427 *of* 1973 :

17. No orders. Dismissed.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

Rasiklal M. Mehta and another .. *Appellants**

v.

The Hindustan Photo Films Manufacturing Company Ltd., a Company registered under the Companies Act having its Registered Office at Indu Nagar, Ootacamund, Nilgiris District, Tamil Nadu. .. *Respondent.*

Transfer of Property Act (IV of 1882), *section* 107—*Lease of building for three years—Registered deed of lease—Lease deed providing for renewal at the option of the lessee for a further period of three years—Lessee exercising option—Renewal document not registered—Effect of non-registration—Lessee vacating premises before expiry of renewed period—Alleged breach of contract—Lessee not liable to pay damages to the lessor.*

Once an option to renew is exercised by the lessor or lessee, a valid lease as such does not come into existence unless a registered document as such is executed if the renewed lease in question satisfies the requirements of section 107 of the Transfer of Property Act. The option conferred either on the lessee or on the lessor is more or less in the nature of pre-emption and neither the conferment of such option itself nor the exercise thereof automatically or of its own force brings into existence a new lease irrespective of other statutory provisions regarding the form, procedure or the modalities by which alone such a lease can be brought into existence. Therefore, once a renewed lease comes within the scope of section 107 of the Transfer of Property Act, such a lease can be made only by a registered instrument. It is a new lease that comes into existence as a result of the exercise of the option for renewal and that too by the bilateral acts of the parties and consequently the new lease is made within the scope of the expression occurring in section 107 and therefore it has to be made only by a registered instrument. When no valid lease for a period of three years is created, no suit could be instituted for recovery of damages for any alleged breach of contract.

[*Para.* 23.]

Cases referred to :—

Baker v. *Merckel Anson,* (1960) 1 Q.B. 657 ; *Sarile Settled Estates,* In re,(1931)2 Ch. 210; *Hand* v. *Hall,* (1877) L.R. Ex. Ch. D. 355 ; *Hand* v. *Hall,* (1877) L.R. Ex. Ch. 318 ; *Zahoor Ahmed Abdul Sathar* v. *State of Uttar Pradesh,* A.I.R. 1965 All. 326 ; *Kai Khushroo Bezonjee Capadia* v. *Bai Jerbai Hirjibhoy Warden and another,* (1949) F.C.R. 262; (1949) F.L.J. 168 : A.I.R. 1949 F.C. 124; *Bengal National Bank Ltd., Janaki Nath Roy and others,* (1927) I.L.R. 54 Cal. 813: A.I.R. 1927 Cal. 725; *Bain* v. *Fothergill,* (1974) L.R. 7 H.L. 158 ; *Regor Estates Ltd.* v. *Wright,* (1951) 1 K.B. 689 ; *Reference under Stamp Act, section* 57 (1902) I.L.R. 25 Mad. 3.

Appeal against the decree of the City Civil Court (Ist Asst. Judge) Madras in Original Suit No. 4120 of 1968.

K. N. Balasubramaniam, for Appellant.

King and *Partridge,* for Respondent.

The Court delivered the following

JUDGMENT. —The plaintiffs in O. S. No. 4120 of 1968 on the file of the City Civil Court, Madras, are the appellants herein. They are admittedly the owners of premises No. 38/3, Mount Road, Madras. The respondent herein took on lease the ground floor of the above premises on a

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*Appeal No. 319 of 1971.

25th July, 1975.

rent of Rs. 4,000 per month. The lease was evidenced by a registered deed dated 22nd April, 1964, Exhibit A-1, in this case. On the same date, an agreement also was entered into between the parties. The lease was to commence from 1st January, 1964 and to be in force for a period of three years till 31st December, 1966. The lease deed contained a covenant for renewal at the option of the lessee for a further period of three years on the same conditions as contained in Exhibit A-1. It is the admitted case of the parties that before the expiry of the three years prescribed in Exhibit A-1, namely 31st December, 1966, the respondent herein exercised the option to renew the lease for a further period of three years and the appellant herein assented to the same. Later in 1967, it would appear that the Secretary of the respondent company had met the second appellant on several days and informed him that the respondent would like to vacate the portion which it was occupying in the appellant's premises since it had been feeling for some time that it needed more space to meet its increasing requirements. That fact is mentioned in Exhibit B-6 dated 8th December, 1967 addressed by the Administrative Officer of the respondent company to the appellants herein. In that letter, the said Officer, while informing the appellants that the respondent had been successful in locating a place to which it would like to shift by 31st January, 1968 at the latest, also stated that if, however, it would be more convenient from the appellants' point of view that the respondent should continue in the present premises for a little more time, it would not mind extending the date of shifting to the new premises to 15th February, 1968 or 29th February, 1968 and that the respondent would be glad to hear from the appellants in this regard as soon as possible. To the above letter, the appellants sent Exhibit B-7 dated 16th December, 1967 stating that by about the expiration of the term of lease, three years under the original agreement, in terms thereof, the respondent itself opted for a renewal for another three years and intimated them also, which was duly confirmed by them ; that it was nearly a year since then, and that at that stage they were sorry that they were unable to do anything in the matter of the respondent's request through Exhibit B-6. On receipt of Exhibit B-7, the Administrative Officer of the respondent company wrote Exhibit B-8 dated 28th December, 1967, stating that the respondent, no doubt, desired to continue in the appellants' premises beyond the period of the lease and the appellants were kind enough to agree to that ; that the respondent would have been quite happy to continue in the present premises but for the reasons explained to the appellants in person by the respondent's Secretary and reiterated in its letter of even number dated 8th December, 1967 ; and that the appellants were also kind enough to appreciate the respondent's need for a change of premises at that stage. The letter proceeded to state that in view of what was stated earlier, the respondent would find it necessary to shift from the present premises to a new building which it had been able to locate, sometime by the end of February, 1968, and that the respondent would be glad if the appellants would kindly arrange to take over the building from the Secretary of the respondent. The appellants wrote Exhibit A-3 dated 6th January, 1968 to the respondent stating that they were unable to accede to the respondent's request for determining the arrangement midterm, since the respondent itself opted for a further period of three years from 1st January, 1967 and a year had elapsed in the renewed term also. In reply to Exhibit A-3, the Administrative Officer of the respondent company wrote Exhibit B-9 reply dated 14th March, 1968 stating that since the termination of the original lease, the respondent had been continuing to occupy the premises on a month to month tenancy basis, and that on account of the respondent's need for greater space, parking facilities etc., it was obliged to vacate the premises. It was further stated therein that although the respondent was liable to give the appellants only 15 days notice, the respondent proposed giving them a longer notice and that it would be vacating the premises on 30th April, 1968. The Administrative Officer of the respondent-company requested the appellants to adjust the sum of Rs. 18,000 lying with them as three months'

advance rent, against the rents for February, March and April, 1968. On receipt of Exhibit B-9, the appellants sent Exhibit B-10 dated 23rd March, 1968 stating that by letter dated 14th March, 1967 the respondent had bound itself to stay on in the property for a further period of three years, that having exercised its option under the lease deed dated 22nd April, 1964, Exhibit A-1, and obtained the consent of the appellants for the extension of the lease period, the respondent was in law bound to pay rent and hire charges for the period ending 31st December, 1969, whether it used the property or not, and that the respondent's contention that after exercising the option clause, the lease had become a monthly tenancy cannot hold water and it was a clear and wanton breach of contract. On receipt of Exhibit B-10, the Administrative Officer of the respondent company wrote Exhibit B-11 dated 4th April, 1968 stating that the respondent could not agree with the appellants' view that the respondent was in law bound to continue as their tenant or to pay rent and furniture hire charges for the premises upto 31st December, 1969 and that if it had been the intention to do so, the respondent would have executed a lease agreement and got it registered under the Registration Act as was done previously. The Administrative Officer of the respondent company reiterated that the respondent would be vacating the premises on 30th April, 1968 and that since the respondent informed the appellants of its intention to vacate the premises as far back as October, 1967, there was absolutely no cause or justification for the appellants taking any action whatsoever as threatened in their letter Exhibit B-10. Ultimately the respondent vacated the premises on 30th April, 1968 and handed over possession of the premises to the appellants herein. Thereafter the appellants filed the present suit claiming damages for alleged breach of contract said to have been committed by the respondent herein. The amounts claimed in the suit consisted of a sum of Rs. 9,000 being the damages suffered by loss of rent for the months of May and June, 1968 and for 7 days in July, 1968 at Rs. 4,000 a month; a sum of Rs. 438.60 being the expenses incurred for publicity to mitigate damages by seeking a new tenant for the balance of the term of 18 months commencing from 1st July, 1968; and Rs. 3,600 being the loss in the rent for 18 months commencing from 1st July, 1968 at the rate of Rs. 200 on the ground that the appellants could get a new tenant only as and from 8th July, 1968 at the rate of Rs. 3,800 per month for the ground floor. The complaint of the appellants in the plaint was that once the respondent exercised its option for renewal of the tenancy, it was bound to continue in possession of the property paying rent for a further period of three years ending with 31st December, 1969, and that inasmuch as the respondent vacated the premises before the expiry of the said period, the appellants were entitled to claim damages from the respondent herein on account of the loss suffered by them.

2. This case of the appellants was resisted by the respondent herein. The respondent contended that there was no lease for a further period of three years ending with 31st December, 1969. After 31st December, 1966, the respondent was in occupation of the property only as a tenant from month to month and the lease could be terminated by giving 15 days notice and the respondent had terminated the lease by giving a larger notice in this case and therefore it was not liable for any damages to the appellants. It also questioned the quantum of the damages claimed by the appellants as well as the interest on damages claimed by them.

3. On the basis of the above pleadings the following issues were framed for trial by the trial Court:

1. Whether plaintiff is entitled to rent for May and June, 1968 and 7 days in July, 1968 at Rs. 4,000 per month?

2. Whether defendant was bound to enter into a lease for a further period of three years from 1st January, 1967? If so, whether there was a breach?

3. Whether plaintiff is entitled to damages at Rs. 200 per month for 18 months from 1st January, 1967?

4. Whether defendant is entitled to a credit of Rs. 200 per month being excess

rent realised for the fourth floor of the premises?

5. Whether plaintiff is entitled to interest ? If so, at what rate?

6. To what relief?

4. The learned Ist Assistant Judge, City Civil Court, Madras, by his judgment and decree dated 19th January, 1970 dismissed the suit instituted by the appellants herein. He took the view that the respondent was not justified in putting forward the contention that there should be a registered document to cover the renewed period, that a valid renewed lease came into existence, but the respondent had a right to terminate the tenancy by giving a reasonable notice, that such reasonable notice had been given in the present case and that therefore the appellants were not entitled to claim any damages from the respondent herein. It is against this judgment and decree that the present appeal has been filed by the plaintiffs in the suit.

The following questions arise for determination in this case. The first question is, whether the contention of the respondent that there should have been a lease under a registered document for the renewed period also and in the absence of such a registered document, there was no valid lease is correct or not. If this contention of the respondent is to prevail then no further question will arise in the present case, because admittedly the suit was instituted by the appellants herein on the basis that there was a valid lease for a particular period and by unilaterally vacating the premises before the expiry of the said period the respondent committed a breach of contract. If, on the other hand, the answer to the first point is that there was no need for a registered document, the second question for consideration would be, whether the appellants were entitled to the damages claimed by them or they were not entitled to claim damages because the lease had been terminated by the respondent by giving a reasonable notice.

5. As far as the second point is concerned, it can be easily disposed of. In the present case, as I have pointed out already, there was Exhibit B-6 dated 8th December, 1967 under which the respondent intimated its intention to vacate the premises by 31st January, 1968 and also pointed out that the respondent would be willing to continue in occupation till 15th February, 1968 or 29th February, 1968. Subsequently, there was Exhibit B-9 dated 14th March, 1968 whereunder the respondent finally gave notice that it would be vacating the premises on 30th April, 1968. It is these notices that were taken to be reasonable notices for terminating the tenancy on the part of the respondent by the learned trial Judge and it is on that basis he held that there was valid termination by the respondent and that the appellants were not entitled to claim any damages or compensation. The question of valid termination will arise only on the basis of assumption of existence of a valid lease. If there had been a valid lease for a further period of three years, the learned counsel for the respondent had to frankly concede that such a lease could not be unilaterally terminated by one of the parties before the expiry of the term for which the tenancy was created and consequently he could not support the conclusion of the learned trial Judge on this aspect of the matter.

6. It may also be noticed in this context that the learned trial Judge misconstrued the scope of clause IV (*c*) of Exhibit A-1. Clause IV (*c*) of the lease deed Exhibit A-1 runs as follows:—

> "The lessees have the option of renewing the lease for a further period of three years on the same terms and conditions as contained herein or terminating the lease by giving the lessors three months' notice in writing before the expiry of the period of lease, if necessary".

The second limb of this clause was taken to mean that the tenant, namely, the respondent had an option of terminating either the original lease or the renewed lease by giving three months' notice in writing. In my opinion, that construction is not sound. It should be noticed that the first limb of this clause does not refer to the respondent exercising its right to have the lease renewed by giving a notice of a particular period. Therefore, a combined reading of the first and second limbs of clause IV (*c*) will lead to

the conclusion that if the respondent did not want to exercise the option of having the lease renewed for a period of three years, it must give intimation of that fact three months before the expiry of the original period of three years and if no such notice was given, the respondent must be deemed to have exercised the option for having the lease renewed for a further period of three years. It is this idea which has been put in clause IV (*c*) of Exhibit A-1, though in a defective and inartistic language. Having regard to the context the setting in which clause IV (*c*) occurs in Exhibit A-1 learned counsel on both sides ultimately agreed that that would be the proper construction of clause IV (*c*) and that the second limb of clause IV (*c*) did not deal with an independent situation of the tenant terminating either the original lease of three years or the renewed lease of three years by giving three months' notice.

7. In view of the above position, the only question that arises for determination is, whether a renewed lease can come into existence validly without there being a registered instrument. The contention of the respondent that there should be a registered document is based upon the language of section 107 of the Transfer of Property Act. According to section 107 of the Transfer of Property Act, a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. There is no dispute in this case that the original lease was for a period of three years and the renewed lease contemplated by Exhibit A-1 was also for a period of three years and therefore would come directly within the scope of section 107 of the Transfer of Property Act. The learned trial Judge has not considered the question, whether a registered document is necessary or not for bringing into existence a renewed lease for a period of three years and all that he had stated in paragraph 12 of the judgment was that in Exhibit B-5 itself the Secretary of the respondent company had clearly and in unequivocal language stated that he was glad to note that the terms and conditions under which the appellants agreed to extend the lease for a further period of three years commencing from 1st January, 1967 would be the same as those which applied to Exhibit A-1 lease, that having thus made the appellants believe that no formal agreement of lease need be executed by the respondent in respect of the extension of the lease and that the extension of the lease would be governed by the terms and conditions contained in Exhibit A-1, it was indeed idle for the respondent to contend that such exercise of the option for renewal by the respondent would not in law create a renewal of lease between the parties and that the absence of a registered lease-deed for a further term of three years was fatal to the appellants'. claim. It is rather difficult to understand what exactly the learned trial Judge meant to state by the above observations. Whether he was putting it on the basis of estoppel or not is not clear and if the law required that the lease deed should be in writing, how the question of estoppel can arise so as to be against the law itself passes one's comprehension. Under these circumstances, the question is completely open as to whether a registered document is necessary or not.

8. I gave more than one opportunity to the learned counsel on both sides to produce any decision or any principle either for or against the contention that a registered document is necessary in respect of a renewed lease. The learned counsel on both sides after taking time informed the Court that there has been no direct decision on this point either way, and a decision has to be arrived at only on the basis of certain general principles and some observations made by Courts in certain other judgments. Under these circumstances, I have necessarily to consider the question without the assistance of any decided cases, but on the basis of the general principles.

9. Before I deal with this question, I shall make a reference to one or two facts in this case. One is, some of the correspondence that passed between the parties referred to the fourth floor of the premises in question having been taken on lease subsequent to Exhibit A-1. But before me the entire argument proceeded on the basis that the property which was the

subject matter of Exhibit A-1 lease was also the subject matter of renewal subsequently. Secondly, the correspondence, passed between the parties also used the expression, "extension of lease". But before me, the argument was advanced by both sides on the basis of renewal as contained in clause IV (*c*) of Exhibit A-1. Therefore, I am dealing with the question only on the basis that there was exercise of option on the part of the respondent herein in terms of clause IV (*c*) of Exhibit A-1 for the purpose of renewing the lease in respect of the identical property for a further period of three years.

10. Mr. K. N. Balasubramaniam, learned counsel for the appellants, contended before me that a covenant for a renewal for a further term in a lease deed is more or less in the nature of a provision for extension of the period of lease and that consequently once the option conferred on the lessee or lessor for the renewal of the lease has been exercised all that happens is that for extension of the original period of lease no registered document is necessary. The learned counsel also contended that a covenant for a renewal in a lease deed can be looked at from another point of view also. That is, the provisions in such a lease deed may be looked at, as the lease to commence immediately for the first period of three years and a future lease to come into existence on the expiry of the term of the first lease, subject to the contingency of the lessee exercising his option, and so far as the present case is concerned, Exhibit A-1 contains both the leases, namely, the lease to commence immediately and the lease to commence in future on the expiration of the period of the first three years, if the lessee had exercised its option, and both the leases having been reduced to writing in the form of Exhibit A-1, a registered document, no further registered document was necessary. In support of these contentions, the learned counsel himself was not able to produce any authority and he relied on only a few statements contained in two decisions to which I shall draw attention immediately.

11. The first decision relied on is *Baker* v. *Merckel Anson*[1] (Third Party). In that case, by a lease under seal dated 17th February, 1947, one Frederick Jonas Baker demised certain premises for a term of seven years from 1st November, 1946, at a yearly rent of £150, to Henry Merckel. In 1949 the landlord and the tenant came to an agreement which was embodied in a supplemental deed endorsed on the lease. The relevant portion of the same was:

> "If the tenant shall give notice in writing to the landlord before 1st November, 1952, of such his desire the within written lease shall thereupon be read, construed and take effect as though the term thereby granted was for a period of 11 years from 1st November, 1946, and that the tenant shall paint the external wood............"

On 9th April, 1951, the lessee assigned the premises, with the benefit of the option; to a third party, namely, Mrs. Anson. On 18th October, 1951, Mrs. Anson by a similar document assigned the premises to the fourth party, namely, James Donald Whites. In 1952 the fourth party validly exercised the option. Later in 1952 the fourth party, in his turn, assigned to Mrs. Dorothy White. In September, 1957, the ultimate assignee Mrs. Dorothy White gave up possession, leaving rent unpaid and having committed breaches of the covenant to repair. The landlord obtained judgment against her for £818 8s. 11d. No recovery was made under that judgment and the landlord then instituted proceedings against the original tenant, Merckel, seeking to recover the same sum against him. The defence admitted the original lease and the supplemental deed but denied that the option was validly exercised. The defendant contended that his liability terminated at 1st November, 1953, the expiry date of the original lease. The Court of Appeal held that the original lessee remained liable by privity of contract, for the effect in law of the supplemental deed was to vary its date, namely, 23rd March, 1949, the seven year lease by building into it an option which, when exercised, would enlarge the term retrospectively to one of 11 years and that accordingly, the rule of

1. (1960) 1 Q.B. 657.

law that an alteration in the term of an existing lease could operate only as a surrender of the old lease and a grant of a new one applied in March, 1949, and not when the option was exercised in 1952, for the exercise of the option was not a consensual matter but a unilateral act, consistent with the contract between the original parties, which by its own force enlarged the demise. Sellers, L.J., referred to the law laid down by Maugham J., In re, *Savile Settled Estates*[1], to the effect:

> "An alteration of an existing lease so that it will operate for a term extending beyond the original term can operate, in law, only as a surrender of the old lease and a grant of a new one".

and proceeded to state:

> "The argument for the appellants was that the operation of the rule did not take place until the option was exercised in 1952 by the fourth party as assignee of the third party, who was an assignee of the defendant, the original lessee, and, therefore, the tenant was not bound to the landlord after the expiration of the seven years as he was not a party to the extended lease.
>
> But what was done in 1949 was not a mere agreement for the future; it was the granting and obtaining by mutual agreement of a right which the tenant could at his option exercise, and which at once became an enforceable part of the contract. The agreement did not of itself enlarge the original term but it provided that it might be extended without any further consent of the lessor and was, therefore, a substantial alteration of a character to which the rule applies".

According to the learned Lord Justice, what had happened was, the supplemental deed of March, 1949, had the effect in law of supplanting the original lease by a new one, the terms of which were derived from reading the two documents together and the effect was to include the option as if it had been in the original lease and there was, therefore, while the landlord and tenant were in direct contractual relationship, a contracted right by unilateral action of the tenant to enlarge the term from seven to eleven years, and to vary by the same action the provisions as to the painting of the outside of the premises. Consequently, the facts of the above case and the reasoning and the conclusion of the Court of Appeal thereon have no relevancy to the question under consideration, namely, whether, when the option for renewal contained in the original lease deed is exercised and a new lease comes into existence, the new lease deed, if it otherwise satisfies the requirements of section 107 of the Transfer of Property, has to be registered or not.

12. The next decision relied on by Mr. K. N. Balasubramaniam is that of the Court of Appeal in *Hand* v. *Hall*[1]. The facts of that case are peculiar. According to the law then in force, a lease for a period exceeding three years, if it was not under seal, was invalid. In that case, the relevant portion of the lease deed which was not under seal was as follows:—

> "Hand agrees to let, and Hall agrees to take, the large room or the south end of...........from the 14th February, next until the following Midsummer twelve months, and with right at end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more".

The tenant did not take possession of the room at all and the rent for the first quarter fell due. The landlord instituted the suit for recovery of the said arrears of rent. Two defences were taken. One was that by the effect of the Statute of Frauds and the Statute 8 and 9 Vict. C. 106, S. 3, it was not a valid lease and the second was that the plaintiff, who was himself a lessee had no title to grant the lease intended, and that the defendant, before entry and before commencement of the intended term, avoided the lease on that ground. Cleasby, B., in *Hand* v. *Hall*[1], held that the lease in question was a lease exceeding three years. It was observed:

> "A lease not exceeding three years, in our opinion, must be a lease not giving a right (independent of the lessor) exceeding three years. We think a demise for three years, and for three years

1. (1931) 2 Ch.210, 217.

1. (1877) L.R. Ex. Ch. Div. 318 at 355.

longer, at the option of the lessee, could not be said to be a lease not exceeding 3 years, and would not be valid if by parol only.

It is true that in the present case the lease is not in the above terms, but the tenant acquires under it a right at his own option by a month's notice to continue it on. If that is given the tenant still holds under the original demise there is no further act of the lessor".

13. When this was taken on appeal to the Court of Appeal, the decision of the trial Judge was reversed. Lord Cairns, in *Hand* v. *Hall*[1], after extracting the provisions in the lease already extracted by me above, preceded to state :

"By this latter part of the agreement (namely), 'with right at the end of that term for the tenant, by a previous month's notice, to remain on for three years and a half more' an option is given to the defendant, and must be exercised by him before it can be said that any interest has passed to him. It is a stipulation that at his option, on a notice given to the plaintiff, he shall not be disturbed for three years and a half. Whereas there is not anything to be done by the tenant in the first part of the agreement to create a demise, in the second part something has to be done by him before that part takes effect, and until that is done it is impossible to tell whether a tenancy shall come into force or not. I think, therefore, that it is absolutely necessary to divide the contract into two parts. I think the agreement is an actual demise, with a stipulation superadded, that if at his option the tenant gives the landlord a notice of his intention to remain, he shall have, a renewal of his tenancy for three years and a half."

In my opinion, the above decision is not of any assistance to decide the controversy in this case. As I have pointed out already, the original term of the lease was only for 12 months and for that the document need not be under seal, but only if the period exceeded three years, it had to be under seal. In that case, only the renewed period contemplated therein exceeded three years and in that context the question was, whether the original lease should be under seal, because the extension contemplated had exceeded three years. It is only in that context the question was decided in that case. The further question that arose was in relation to recovery of the rent for the first quarter itself, that is, within the first twelve months. Admittedly the lease for the first twelve months need not have been under seal. Therefore, that decision has no bearing on the point to be considered in the present case.

14. On the other hand, there are certain observations made by some Courts in this country which have a bearing on this question. For the purpose of understanding this, it is necessary to refer to some more provisions of the Transfer of Property Act. Section 105 of the Transfer of Property Act defines "lease" and also the terms, "lessor", "lessee", "premium" and "rent". Section 106 deals with presumption regarding the duration of certain leases, in the absence of written contract or local usage. Section 107 which alone deals with, how lease should be made, runs as follows:—

"107. A lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instru-

1. (1877) L.R. Ex. Ch. Div. 318.

ment or by oral agreement without delivery of possession".

Section 108 deals with rights and liabilities of lessor and lessee, while section 109 deals with the rights of lessor's transferee. Section 110 deals with exclusion of the day on which the term of lease commences. Section 111 deals with determination of lease. Sections 112, 113, 114 and 114-A deal with waiver of forfeiture, waiver of notice to quit, relief against forfeiture for non-payment of rent and relief against forfeiture in certain other cases respectively. Section 115 deals with the effect of surrender and forfeiture on under-leases. Section 116 deals with the effect of holding over and that section is as follows:—

"116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106".

The question has come up for consideration in the context of the language of section 116.

15. In *Zahoor Ahmad Abdul Sattar* v. *State of Uttar Pradesh and another*[1], a Bench of the Allahabad High Court had to consider the effect of "holding over" by a tenant after the original period of lease was over. The appellant therein was granted a lease of land for industrial purposes from 1st March, 1947 by the Government for one year at an annual rent of Rs. 100. A document was executed and that was marked as Ex. 3. A subsequent lease for the same sum of Rs. 100 was executed on the 10th June, 1948 for one year beginning the 19th of March, 1948. That document was marked Exhibit 4. One question that came to be considered was about the effect of holding over as contemplated in section 116 of the Transfer of Property Act. Having regard to the periods mentioned in Exhibits 3 and 4, the question of registration did not directly arise. However, the Court observed:

"As to the renewal of the lease by holding over in the instant case also it was not necessary for it to be a registered instrument. No doubt, under section 116 of the Transfer of Property Act by holding over, the defendant became a tenant from year to year but as the relationship of landlord and tenant between the plaintiff and the defendant was a result of operation of the law and not the result of an act of parties section 107 would not apply. Section 107 applies to leases that are 'made' and not to leases that are created by law. As a result of the holding over there is a case of the renewal only by operation of law and not the making of the lease".

The learned counsel for the respondent submitted that the above observations meant by implication, that if, after the expiration of the original period of lease, a lessee continues to remain in possession of the property on a subsequent lease, and that subsequent lease comes within the scope of section 107, that lease can be brought about only by a registered instrument and that only because of section 116, statutorily creating the subsequent lease, the provision regarding the requirement of a registered instrument did not arise in that case. It is rather doubtful whether the above observation can be said to represent correctly the legal position. Even section 116 contemplates a subsequent lease by act of parties. The significant thing to be noticed with regard to section 116 is, it actually uses the expression, "lease is........renewed from year to year or from month to month". In view of this, the Federal Court of India in *Kai Khushroo Bezonjee Capadia* v. *Pai Jarbai Hirjibhoy Warden and another*[1], proceeded on the basis that even in respect of holding over, a new lease comes into existence by the consensual act of parties, though there was a difference of opinion between the majority of Judges and Patanjali Sastri, J., as to whether such a new lease came into existence on the facts of the

1. A.I.R. 1965 All. 326.

1. 1949 F.C.R. 262: 1949 F.L.J. 168: A.I.R. 1949 F.C. 124.

particular case or not. According to the majority, the tenancy which is created by the 'holding over' of a lessee or under-lessee is a new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that to bring a new tenancy into existence, there must be a bilateral act.

16. In *Bengal National Bank Ltd.* v. *Janaki Nath Roy and others*[1], Rankin, C.J., on behalf of the Bench of the Calcutta High Court had to make some observations with regard to section 116 itself. The learned Chief Justice stated:

> "Apart from specific performance of the covenant for renewal, what is the effect of the Transfer of Property Act when applied to the facts of the present case ? The statute uses the word 'lease' not merely for interests which can only be created by registered instrument but for all interests of the character defined by section 105. Section 106 speaks of a 'lease from month to month' and section 116 which deals with the effect of holding over says that 'the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.'
>
> This provision must, I think, by regarded as supplemental to and in qualification of clause (*a*) of section 111 which states that a lease determines by efflux of the time limited thereby. But I do not think it can be read as meaning that if there is no agreement to the contrary the lease is renewed from month to month but that if there is an agreement for any other period then the lease is renewed for that period however long."

17. This would seriously trench upon the policy of section 107. The intention of section 116 is in my judgment that the lessee holding over with the landlord's mere consent has still a lease but only from month to month; he gets this but no greater interest and he does not even get this if there be an agreement with the landlord that he is to be a mere licensee, tenant-on-sufferance or tenant-at-will. The tenant continuing in occupation under a special agreement for a further lease is a different case from the tenant holding over merely by consent, but if for any reason his agreement has to be disregarded he can fall back upon the landlord's mere consent and claim his rights under section 116. If the matter be regarded in the first instance as between lessor and lessee the position is that the latter is either: (*i*) by virtue of the doctrine of specific performance or otherwise clothed with the estate and right given by the special agreement or; (*ii*) the holder of a lease from month to month. It is doubtless true that if at the expiry of the original term the person who continues in occupation is not the lessee but his representatives or assigns there is nothing in section 116 to enable the lessor by mere consent to convert such representative or assign into a monthly tenant. The obvious inference from the above observation of the learned Chief Justice is, under the cloak of "an agreement to the contrary" contained in section 116 of the Transfer of Property Act, there cannot be a lease coming within the scope of section 107 of the Transfer of Property Act, without there being a registered instrument creating such a lease.

18. The next decision to which my attention was drawn by the learned counsel for the respondent is that of a Full Bench of this Court on *Reference under Stamp Act, section* 57.[1] In that case, there was an instrument of lease for a term of three years on a monthly rent of Rs. 190 with a covenant on the part of the lessor to renew the lessee at the option of the lessee for a further term of one or two years from the expiration of the said term of three years. The question that came to be considered was, whether the document had to be stamped on the basis of there being two transactions, one, a lease for a period of three years, and another an agreement for granting a lease for a further period. This Court held that the document had to be stamped only as a lease. This Court pointed out:

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1. (1927) I.L.R. 54 Cal. 813 : A.I.R. 1927 Cal. 725.

1. (1902) I.L.R. 25 Mad. 3.

"The lessee agrees, among other things, to pay a monthly rent of Rs. 190 for the premises in question for a period of three years in consideration of the lessor demising the premises for a period of three years and also agreeing to renew the lease, at the option of the lessee, for a further term of one or two years. If the covenant to renew were disannexed from the lease, there would be no consideration for the covenant to renew. A covenant for renewal at the option of the lessee is an ordinary covenant in a great many leases and for at least two centuries, it has been held to be a covenant running with the land. A mere agreement to lease is not a covenant which will run with the land and will not bind a transferee for agreement. The transaction or matter to which the instrument in question relates is single and indivisible and cannot be treated as relating to two distinct matters within the meaning of section 5 of the Stamp Act. The instrument contains only one contract, a demise ; the option of renewal of the lease is ancillary to it and forms part of the consideration for entering into the lease."

In my opinion, this decision does not really throw any light on the question we are considering.

19. My attention was also drawn to the following passage occurring in Mayne and Macregor on Damages, Twelfth Edition, page 431 :

" Covenants to renew leases and options to purchase in leases are but agreements to lease and agreements to sell respectively super-imposed upon an existing lease between the same parties. A breach of such covenant or option is thus in effect a failure to complete a contract to lease or sell, and therefore the rule in *Bain* v. *Fothergill*[1], imposing a restrictive measure of damages is in full operation should the failure be through a defect in title."

The argument based upon the above passage is that the covenant for renewal of a lease is merely an agreement to obtain a fresh lease and that that by itself does not create a lease. Therefore, if a fresh lease is to be brought into existence, it can be effected only by means of a registered instrument.

20. I am of the opinion that the matter can be considered from a different angle. I have already referred to the decision of the Federal Court of India in *Kai Khushroo Bezonjee Capadia* v. *Bai Jerbai Hirjibhey Warden and another*[1], where the Federal Court was considering the scope of section 116 of the Transfer of Property Act and having regard to the language used therein it came to the conclusion that a lease by holding over was merely a new lease brought into existence by the bilateral act of the lessor and lessee. Having regard to the use of the word, "renewed" in section 116 of the Transfer of Property Act and the construction put upon that section by the Federal Court, I am inclined to hold that even when there is an option for a renewal in a fresh lease and for a valid lease to come into existence, if such lease otherwise satisfies the requirements of section 107. There must be a registered instrument.

" The ordinary meaning of the word, ' renew ' is to bring again ; to repeat to make again; to substitute new for". (*Vide* Chambers Twentieth Century Dictionary, New Edition, 1972)

According to Shorter Oxford English Dictionary, the meaning of the word, ' renew ' is :

" To restore, re-establish, set up again, being back into use or existence ; To take up again or afresh, to begin again, recommence ;

To replace by some new or fresh thing of the kind, to restore by means of substitution or a fresh supply ;

To grant a new esp. to grant or give (a lease, bill, etc.) for a fresh period".

Thus, it will be seen that the Dictionary meaning of the word, ' renew ' in relation to grant of lease, is to grant a new or to grant or give a lease for a fresh period. In Ballentine's Law Dictionary,

1. (1974) L.R. 7 H.L. 158.

1. (1949) F.C.R. 262 : A.I.R. 1949 F.C. 124.

Second Edition, the meaning of "renewal of lease" is given as :

> "There is a distinction between a stipulation in a lease to renew for an additional term and one to extend it, in that a stipulation to renew requires the making of a new lease, while a stipulation to extend does not."

Section 2 (1) of the English Landlord and Tenant (Rent Control). Act, 1949, 12 & 13 Geo. 6, Ch. 40 stated that, a person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent". Thus, it will be seen that this section uses all the three expression, "grant of a tenancy", "renewal of a tenancy" and 'continuance of a tenancy'. The scope of these expressions contained in this section came to be considered by the Court of Appeal in England in *Regor Estates Ltd.* v. *Wright*[1]. Denning, L. J., with regard to these provisions stated :

> "Under the Act of 1949 a landlord must not require a payment of a premimum on any of the following agreements if made since the Act:—(1) on a "grant of tenancy" (which means an agreement to grant an initial tenancy) (2) on a "renewal of tenancy" (which means an agreement for a fresh tenancy following on the termination of the earlier one); and (3) on a "continuance of a tenancy' which means, I think, an agreement to continue an existing tenancy, as, for instance, by agreeing not to give notice to determine or to re-enter under a provision in that behalf)."

Thus, it will be seen that the expression, "renewal of tenancy" has been understood as "an agreement for a fresh tenancy following on the termination of the earlier tenancy" and this meaning of Denning L. J., is consistent with the meaning contained in Ballentine's Law Dictionary.

21. Thus, it will be clear that once a tenant or lessor exercises his option for renewal of an existing tenancy for a further period, what comes into existence is a fresh tenancy in replacement of the old tenancy, and such tenancy will have to satisfy the requirements of the law regarding the making of the tenancy. I have already extracted the provisions of section 107 of the Transfer of Property Act. The provisions contained therein make it absolutely clear that it is the policy of the law that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument and not otherwise. The use of the expression only occurring in the first limb of section 107 is significant. The proviso to the section enables the State Government from time to time by notification in the official gazette, to direct that leases of immovable property may be made by unregistered instrument or by oral agreement without delivery of possession. But the statute has taken care to see that even the State Government has no right by such notification to exclude the leases from year to year or for any term exceeding one year or reserving a yearly rent from the requirements of their being made or created only by registered instruments. Consequently, the policy of law is that a lease which satisfies the requirements mentioned in that section has to be only by a registered instrument and not otherwise. The significance of this can be appreciated only if we realise that there are provisions in the Registration Act as well as the Stamp Act dealing with leases. The Stamp Act deals with leases in the context of the stamp duty payable thereon and the duration of the lease is the criterion for determining the quantum of stamp duty. So also the Registration Act gives a wider definition to the term 'lease' and also requires the lease deed coming within the scope of the provisions contained therein to be registered. The object of the Stamp Act is to collect revenue and the object of the Registration Act is to give notice to other parties as well as to insist upon certain transactions being effected and proved by registered instruments only. On the other hand, The Transfer of Property Act dealing with the transfer of interests in immovable

1. (1951) 1 K.B. 689 at 703.

property expressly states that a lease deed of the kind mentioned in section 107 can be brought into existence only by means of a registered instrument. If so, to come to a conclusion which will have the effect of avoiding the provisions contained therein will be opposed to the policy of law itself.

22. Let me take an illustration. Suppose a landlord and a tenant enter into a lease in respect of immovable property and fix the duration of the lease as six months. Such a lease is not required to be by a registered instrument under section 107 of the Transfer of Property Act, in view of the duration mentioned above. Suppose that lease also contains a covenant for renewal either at the option of the lessee or at the option of the lessor, whereunder on the exercise of the option, the lease will stand renewed for a period of three years. If the argument of the learned counsel for the appellants is to be accepted, the request will be that the original lease need not be under a registered document because it was not for a period exceeding one year and the renewed lease need not be by way of a registered instrument, though for a term exceeding one year, because the renewal will not constitute making of a new lease, but merely the continuance of the old lease. I am clearly of the opinion that such a construction will defeat the very object of section 107 of the Transfer of Property Act and therefore cannot be countenanced by Courts. As a matter of fact, the entire section can be nullified and rendered nugatory by a landlord and tenant entering into a lease for a very short period which does not require registration, but providing for a renewal which will extend for more than one year, with a view to avoid the necessity of bringing into existence a registered document, even though their intention from the very beginning had been to make the lease for a period exceeding one year.

23. The result, is, once the option is exercised either by the lessor or by the lessee, a valid lease as such does not come into existence unless a registered document is executed, if the renewed lease in question satisfies the requirements of section 107 of the Transfer of Property Act. After all, the option conferred either on the lesse or on the lessor is more or less in the nature of a pre-emption and neither the conferment of such option itself nor the exercise thereof automatically or of its own force brings into existence a new lease irrespective of other statutory provisions regarding the form, procedure or the modalities by which alone such a lease can be brought into existence. Therefore, looked at from, any point of view, I am of the opinion that once a renewed lease comes within the scope of section 107 of the Transfer of Property Act, such a lease can be made only by a registered instrument. I am emphasising that notwithstanding the option conferred on the lessor or the lessee, in the light of the judgment of the Federal Court referred to above, it is a new lease that comes into existence as a result of the exercise of the option for renewal and that too by the bilateral acts of the parties and consequently the new lease is made within the scope of the expression occurring in section 107 of the Transfer of Property Act and therefore it has to be only by a registered instrument. In this case, admittedly the renewed lease was for a period of three years and if it has not been a renewed lease, the initial lease itself, there was no dispute that it required registration. Simply because it happened to be a renewed lease, it does not follow that no registered document was necessary to bring into existence such a lease. In this particular case, the appellants instituted the suit only on the basis of a valid renewed lease for a period of three years and the respondent herein having committed a breach of that contract by surrendering possession or terminating that lease prior to the expiration of the period prescribed thereunder. Once I hold that such a lease should have been made only by a registered instrument and there being no registered instrument, there was no valid lease for a period of three years, the appellants were not entitled to institute the suit for recovery of the amounts in question as damages for breach of the contract alleged to have been committed by the respondent herein.

24. The result is, the appeal fails and the dismissal of the suit by the trial Court is

ustained, though for different reasons. Having regard to the nature of the controversy and there being no authority on the point in question, I consider that this is a proper case in which both parties should be directed to bear their costs.

R.S. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

Vijayaraghavan .. *Petitioner**

v.

Mohammed Yakub Rowther (died) and others .. *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960)*—Landlady—Petition for eviction on grounds of wilful default and need for personal occupation for carrying on business—Eviction ordered—Appeal by tenant—Death of landlady during pendency of appeal—Husband, son and daughter brought on record—Dismissal of appeal—Revision by tenant—Husband dying pending revision—Son and daughter, whether entitled to the benefit of the order of eviction.*

(B) *Maxim*—"Actio personalis mortiur cum persona—*Exceptions.*

A personal action dies with the person is a well established principle, even that doctrine has certain exceptions. In a case where the litigant seeks for a statutory relief in relation to property and obtains it after satisfying the statutory Tribunal that he or she is entitled to that relief, then that decision which projects a right becomes annexed to the property of that litigant who initiated the action and it cannot be divested by invocation of any technicalities. [*Para.* 3.]

The general doctrine cannot be inducted as a matter of course into decisions obtained under peculiar circumstances and under given conditions and prescriptions as per the special enactment. The Tamil Nadu Buildings (Lease and Rent Control) Act provides for certain reliefs in favour of landlords and concurrently enables the tenants to continue in occupation of the demised premises unless they are compelled to surrender that possession by invocation of a special law. Therefore, if a landlord or a landlady, as the case may be, comes to Court and obtains possession, not under a contract, but under the provisions of a statute and that too under the stringent clauses, the invocation of which alone could enable the landlord or the landlady to obtain possession, then such a right cannot be barely characterised as a personal right which ought to die with the person concerned. The exception to the above doctrine that a personal right dies with the person can certainly be invoked having regard to the peculiar nature of the right obtained by the landlord or landlady, under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960).

[*Para.* 6.]

The benefit by way of a decree which a predecessor-in-interest has secured being an incorporeal right and that right having vested in a landlord or landlady in that a decreee for eviction has already been passed cannot be divested by his or by her death, and it could pass on to the heirs as it becomes part and parcel of the property owned by the landlord or landlady.

[*Para.* 7]

Cases referred to :—

Phool Rani v. *Naubat Rai,* (1973) 1 S.C.C. 688: (1973) 2 S.C.J. 589: (1973) 3 S.C.R. 679 : A.I.R. 1973 S.C. 2110; *Mohammed Ibrahim* v. *Rahiman Khan,* (1947) 2 M.L.J. 419: 60 L.W. 713: 1947 M.W.N. 655.

Petition under section 25 of Madras Act XVIII of 1960 as amended by Act XXIII of 1975 praying the High Court to revise the order of the Court of the Subordinate Judge, Nagapattinam dated 2nd August, 1973 and made in C. M. A. No. 63 of 1972 (Rcop No. 47 of 1969 Rent Controller (District Munsif), Tiruvarur).

K. Chandramouli and *T. R. Rajagopalan,* for Petitioner.

S. V. Kumaraswami, for Respondents.

*C.R.P. No. 1898 of 1973. *27th August,* 1975.

The Court delivered the following

JUDGMENT.—An interesting question has arisen in this civil revision petition. One Rokkaiya Ammal was the owner of a property a portion of which was let out to the petitioner. It is not in dispute that the petitioner is actually in occupation of a thatched bunk of an extent 5′x 4′. The landlady filed an application under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, on the ground that the petitioner had committed wilful default and also on the ground that she wanted the leased premises for her husband's business of making articles from zinc and iron sheets. The Rent Controller ordered eviction on both the grounds. The appellate authority was not convinced that there was wilful default in the payment of rent, but he was, however, satisfied that the landlady was entitled to the possession of the building for purposes of her husband's business. In the course of the hearing of the appeal, the landlady died and her husband, her son and her daughter were brought on record and the appeal proceeded with the above three persons as her legal representatives and resulted in a decision in their favour. The petitioner-tenant has come up in revision to this Court. During the pendency of the revision petition, the husband of the landlady died leaving behind the son and daughter as the legal representatives of the landlady to continue the proceedings.

2. Mr. Chandra Mouli, learned counsel for the petitioner, takes up the position that as the husband of the landlady died, though at the revision stage, the purpose for which the building was required by the landlady having lapsed, the respondents as the surviving legal representatives of the landlady are not entitled to the benefit of the order of eviction obtained by her in both the Courts below. He would say that once a landlady comes to Court on the ground that a portion in the occupation of the tenant is required for the landlady or for her near and dear, as provided under the Act and if she obtains an order of eviction but dies in the course of such proceedings, the cause of action does not survive, to the benefit of her legal representatives and such legal representatives could only seek relief by filing an independent application as provided for under the Act, on the new facts and circumstances which have cropped up due to the death of the landlady. Mr. Kumaraswamy, learned counsel for the legal representatives on record before me, however, would say that there is no such snapping of the cause of action by reason of the death of the original landlady and that, in any event, if the landlady dies after she obtains an order of eviction and if the said decision is questioned before the higher hierarchy, then it would be in the fitness of things that the legal representatives should take advantage of the decision obtained by the landlady earlier and it is not necessary for them to file an independent application for the same relief, as if a different set of circumstances have cropped up due to the death of the landlady.

3. A personal action dies with the person is a well established principle. Even that doctrine has certain exceptions. In a case where a litigant seeks for a statutory relief in relation to property and obtains it after satisfying the statutory Tribunal that he or she is entitled to that relief, then that decision which projects a right becomes annexed to the property of that litigant who initiated the action and it cannot be divested by invocation of any technicalities. The mother in the instant case wanted that her husband should do business and therefore the petitioner-tenant should surrender possession to enable her husband to do such business. The son and daughter who are before me express their candid intention to continue that business of their father by occupying the shed in the occupation of the petitioner. On the facts, therefore, there does not seem to be any doubt whatever that the son and daughter intend carrying on the business of their father and so they are keen to obtain the non-residential premises in the occupation of the petitioner.

4. Thyagarajan, J., in *Muhammad Ibrahim* v. *Rahiman Khan*[1], while considering an

1. (1947) 2 M.L.J. 419 : 60 L.W. 713 : (1947) M.W.N. 655.

earlier encroachment of the subject, widely expressed that an order of the Rent Controller directing the tenant to put the landlord in possession of his house on the ground that the landlord desired to occupy the house himself, is one for the personal benefit of the landlord and is not capable of execution after the death of the landlord at the instance of the legal representatives. The learned Judge was of the view that if the legal representatives desired to obtain such possession, they should file an independent application and obtain relief.

5. The point, however for consideration is as to what is the legal effect of an order which a landlord secures from the Rent Controller or such other statutory Tribunal which would entitle him to obtain possession from his tenant should it automatically lapse on the death of that person in whose favour a decision was so rendered.

6. Whatever may be said of the general principle *actio personalis moritur cum persona* which itself has some exceptions, that general doctrine cannot be inducted as a matter of course into decisions obtained under peculiar circumstances and under given conditions and prescriptions as per the special enactment. The Tamli Nadu Buildings (Lease and Rent Control) Act provides for certain reliefs in favour of landlords and concurrently enables the tenants to continue in occupation of the demised premises unless they are compelled to surrender that possession by an invocation of the special law. Therefore, if a landlord or a landlady, as the case may be, comes to Court and obtains possession whereby the tenant would be obliged to surrender possession not under a contract, but under the provisions of a statute and that too under the stringent clauses, the invocation of which alone could enable the landlord or landlady to obtain possession, then such a right cannot be barely characterised as a personal right which ought to die with the person concerned. The exception to the above doctrine that a personal right dies with the person can certainly be invoked having regard to the peculiar nature of the right obtained by the landlord or landlady under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960). It is this peculiarity in the incorporeal right obtained by the landlord in such circumstances that has been referred to by the Supreme Court in *Phool Rani* v. *Naubat Rai*[1], as a right which is annexed to the estate of the deceased and that such annexation resulting in the benefit to the estate could be taken advantage of by the legal representatives of the person who obtains such a benefit. Though the Supreme Court referred to *Muhammed Ibrahim* v. *Rahiman Khan*[2]; yet by reason of the distinguishing features charactarised by them in the judgment which would take some cases out of the general rule stated by Thyagarajan, J., in *Muhammed Ibrahim* v. *Rahiman Khan*[2], I am of the view that the present case is distinguishable from the general posee of cases which would arise under such circumstances. The Supreme Court would say that a case in which the petitioner's death occurs after a decree for possession is passed in his favour, say, during the pendency of the appeal filed by the unsuccessful tenant is one of the many categories of cases which ought to be distinguished from the generality of cases which usually arise for consideration. Dealing with such a category, the Supreme Court observed :

> " Cases falling under this category are distinguishable because the decisions therein are explicable on the basis, though not always so expressed that the estate is entitled to the benefit which, under a decree; has accrued in favour of the plaintiff and therefore the legal representatives are entitled to defend further proceedings, like an appeal, which constitute a challenge to that benefit."

7. While I respectfully adopt the observations as above, I would like to add that the benefit by way of a decree which a predecessor-in-interest has secured being an incorporeal right and that right having vested in a landlord or landlady in that a decree for eviction has already been passed cannot be divested by his or her death, as it could pass on to the heirs as it becomes part and parcel of the property owned by the landlord or landlady. Thus

1. (1973) 1 S.C.C. 688 : (1973) 2 S.C.J. 589 : (1973) 3 S.C.R. 679 : A.I.R. 1973 S.C. 2110.
2. (1947) 2 M.L.J. 419 : 60 L.W. 713 : (1947) M.W.N. 655.

viewed, the respondents before me are entitled in law and in equity to take advantage of, the favourable decision obtained by their mother before the Rent Controller and which gained, acceptance before the appellate authority as well. There cannot be a divesting of such right by reason of the death of the father during the course of the revision proceedings. The right to process an order of eviction is already in the stream of execution and it cannot be stemmed by reason of the death of the father at the revision stage. The respondents do assert that they want to continue the business which their father wanted to commence and this aspect cannot therefore be lightly brushed aside factually.

8. The concurrent finding of fact that the premises is required *bona fide* for purposes of business of the father cannot be interfered with or set aside by this Court.

9. On a consideration of the relevant provisions of law and the decisions, I am of the view that the order of the Court below does not suffer from any error of jurisdiction. Of course, the present point has arisen only at the revision stage. I have considered this aspect, since the point raised poses some general interest.

10. The revision petition is dismissed. There will be no order as to costs. The petitioner will surrender possession within six months after this date.

R. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

The Workmen of Saroja Mills (Private) Limited, Singanallur, Coimbatore, represented by the National Textile Employees Union, Coimbatore ... *Petitioners**

v.

The Presiding Officer, Labour Court, Coimbatore and others...*Respondents.*

Industrial Disputes Act (XIV of 1947), section 12 (3)—Mill—Dispute between Management and Workers—Settlement—Interpretation of clause in the settlement—Dispute referred to Labour Court—Lay off of badlis—Order of Labour Court challenged —Scope of reference.

In a settlement between the management and workers of a Mill, under section 12 (3) of the Industrial Disputes Act, 1947, there was a clause relating to lay off of the badli workers made permanent in the spinning department. There was a dispute between the workers and the management as to how many workers were to be laid off under the clause. This was referred to the Labour Court which passed the impugned order. The workmen challenged the order on the ground that the Labour Court went far beyond the terms of reference.

Held, The essential policy underlying the Act was to maintain industrial harmony and avoid disputes and it was, therefore, necessary for the Labour Court to decide the manner in which the workmen (absorbed under the settlement) had to be laid off along with the other permanent workmen. In so doing, it had not tread beyond the scope of its reference, but it had decided only the real dispute between the parties. There was no error in the impugned order. [*Para.* 17.]

Cases Referred to :—

Ramamoorthy v. *Secretary, Tirunelveli Dt. M.P.W. Union*, (1964) 1 M.L.J. 80 ; *Delhi Cloth and General Mills* v. *Its Workmen*,

*W.P. No. 2381 of 1975. *29th August, 1975.*

30 F.J.R. 533 : (1967) 1 Lab.L.J. 423 : (1967) 1 S.C.R. 882: (1968) 1 S.C.J. 229: A.I.R. 1967 S.C. 469; *Express Newspapers* v. *Their Workers and Staff*, (1962) 2 L.L.J. 227 : (1963) 3 S.C.R. 548 : A.I.R. 1963 S.C. 569; *Minimax* v. *Its Workman*, (1968) 1 L.L.J. 369 ; *Workmen Mysore Paper Mills* v. *Mysore Paper Mills*, (1970) 2 L & I.C. 1113.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st Respondent the Presiding Officer, Labour Court, Coimbatore, in I.D. No. 90 of 1974, dated 24th February, 1975 and quash the order made herein.

K. Govindarajan, for Petitioners.

J. Kanakaraj of *M/s. Raj & Raj* and *K.S. Narayanan*, for Respondents.

The Court made the following

ORDER.—This writ of *certiorari* is to call for the records in I.D.No. 90 of 1974, dated 24th February, 1975 and quash the same.

2. The National Textile Employees' Union, Coimbatore, is the petitioner. In the affidavit in support of the petition, it is stated as follows :—

3. A settlement, dated 10th of September, 1973 was reached under section 12 (3) of the Industrial Disputes Act, 1947, (hereinafter referred to as the Act) binding all workmen of the second respondent Mills, on issues relating to permanency of Badli Workers and their lay off. The petitioner Union and respondents 3 to 6, Unions, were parties to the settlement. Clause 14 of that Settlement, which gave rise to the present dispute is as follows :

> "It is agreed to fill up the present vacancies, 28 badlies (selected on seniority) out of the complement of 32 and over and above this, 22 badlies in spinning shall be made permanent. The remaining badlies numbering 32 shall be made permanent on 1st April, 1974. The badlies in spinning now made permanent shall be laid off when they are found surplus. The badli strength (10%) on the required complement of permanent workers shall be filled up on 1st April, 1974 and shall be decided on the basis of seniority."

4. In the discussion, preceding the settlement, the Management agreed to absorb only 28 badli workers as permanent workers, having regard to their employment strength. But, at the request of the Union, it was further agreed to make 22 more badlies permanent and the balance of 32, permanent by 1st April, 1974, thus making a grand total of 82 badlies. Under clause 14, the question arose as to how many workers were to be laid off. This dispute was referred to the Labour Court (first respondent) by the Government of Tamil Nadu, in G.O. Rt. No. 1894, Department of Labour, Employment and Housing, dated 3rd October, 1974. The same was taken as I.D. No. 90 of 1974 and the impugned order was passed.

5. The award of the Labour Court is vitiated for the following reasons :

(1) The only issue before the Labour Court was whether the 22 badli workers made permanent, should be laid off first, or, all the 82 badlies should be laid off, in the event of a lay off. But, it went far beyond the terms of reference by holding that all the permanent workers of the Mills should also be laid off rotationally along with the 82 badlies, now made permanent.

(2) The Labour Court ought to have held that the 22 badlies, now made permanent, should be laid off first, and later, the balance of 32 badlies, in the event of a lay off.

(3) The interpretation placed by the Labour Court on clause 14 is wrong.

6. A counter-affidavit has been filed denying the various allegations made in the affidavit and contending that it is incorrect to state the Labour Court has gone beyond the scope of reference and all that it has done is incidental to the main issue for reference, which the Labour Court is entitled to, in order to prevent industrial unrest, which is the duty of the Labour Court, and no exception could be taken to the impugned order, which is perfectly valid in law.

7. Mr. Govindarajan, learned counsel for the Writ Petitioner, submits before me that in so far as the Labour Court has held that all the 82 badlies, made permanent, should be laid off in rotation with the other workers of the Mills, who were permanent even before 10th September, 1973 it has gone beyond the scope of the reference, since the only question before the Labour Court was whether only the 22 badlies were to be laid off first or all the 82 badlies, now made permanent should be laid off. Therefore, according to him, that part of the order is bad in law.

8. In support of his submission, the learned counsel relies on the rulings in *Ramamoorthy* v. *Secretary, Tirunelveli Dt. M.P.W. Union*[1], and *Delhi Cloth and General Mills* v. *Its Workmen*[2].

9. In meeting these submissions, Mr. Narayanan, learned counsel appearing for the contesting Union, would submit that what has now been decided by the Labour Court is fully within the scope of the reference and merely because the manner in which the 82 badlies are to be laid off has been laid down, it does not mean that the Labour Court has acted beyond the scope of its reference. If it were not so decided, there will be two categories of workers and lay offs, which will definitely cause industrial unrest. In order to prevent the same, it is the duty of the Labour Court to find out the true scope of the reference and decide the same, and that is what has been done in the instant case. According to him, the rulings in *Express Newspapers* v. *Their Workers and Staff*[3], *Minimax* v. *Its Workmen*[4] and *Workmen, Mysore Paper Mills* v. *Mysore Paper Mills*[5], do support this contention. In addition to the above, he relies on the decision in *Delhi Cloth and General Mills* v. *Its Workmen*[2], the very ruling cited by the writ petitioner.

10. The entire controversy is about the scope of the reference made in G.O. Rt. No. 1894, Department of Labour, Employment and Housing, dated 3rd October, 1974 and it is extracted for a proper appreciation of the case.

> "Whether item 14 of the terms of settlement, dated the 10th September, 1973 under sub-section (3) of section 12 of the Industrial Disputes Act, 1947, Central Act XIV of 1947 is to be construed to mean that the 22 badlies from spinning department made permanent thereunder should alone be laid off when found surplus or the 82 badlies made permanent as per that term should be laid off when found surplus."

According to the writ petitioner, preceding the settlement, dated 10th September, 1973, reached under section 12 (3) of the Act there were talks on which clause 14, came to be entered into. On an analysis of that clause, the following emerge :

(*i*) "To fill up the present vacancies, 28 badlies out of the 32, shall be absorbed and over and above this, 22 badlies shall be made permanent. (*ii*) The remaining 32 badlies shall be made permanent on 1st April, 1974." Upto this, there is no controversy. The real controversy is concerning the lay off. As regards that, it says that the badlies in Spinning department, now made permanent, shall be laid off when they are found surplus.' It is not correct on the part of the writ petitioner to contend that only the 22 badlies have to be laid off, since all the 82 workmen were made permanent on 1st April, 1974. The result of making them permanent is that they will have to be treated on the same footing with the other permanent workmen. When it comes to the question of lay off, certainly, all the workmen, being of the same category, will have to be laid off in rotation, and that is what the Labour Court has done. I am unable to agree with the submission of the learned Counsel for the writ petitioner, that in doing so, the Labour Court has gone beyond the scope of the reference.

11. In *Ramamoorthy* v. *Secretary, Tirunelveli Dt. N.P.W. Union*[1], the first issue covered by the reference was "whether the non-employment of the 34 workmen, consequent on the dissolution of the

1. (1964) 1 M.L.J. 80.
2. (1967) 1 S.C.R. 882 : (1968) 1 S.C.J. 229 : A.I.R. 1967 S.C. 469.
3. (1962) 2 L.L.J. 227 : (1963) 3 S.C.R. 548 : A.I.R. 1963 S.C. 569.
4. (1968) 1 L.L.J. 369.
5. (1970) 2 L. & I.C. 1113.

1. (1964) 1 M.L.J. 80.

partnership firm, was justified ; if not, to what relief they are entitled" and the second issue related to the computation of the relief, which was consequential upon the first issue. The learned Judge, in construing this reference held that it did not appear to include the question as to what was the effect of the dissolution of the partnership and the division of the estate on the labour force attached to the estate. On that basis, the order of the Tribunal on these two issues was quashed, since the Tribunal had assumed that the 34 workmen were not employed consequent on the dissolution of the partnership. This case certainly cannot be of any assistance to the writ petitioner.

12. In *Delhi Cloth and General Mills* v. *Its Workmen*[1], where the terms of reference were about the legality and justification of strike and lock out in a particular mill on a particular date, it was held that the Tribunal must confine its decision only to the question whether strike and lock out were legal and justified or not, and it could not enlarge the scope of its jurisdiction and decide that there was no strike or lock out at all. At page 475, it was held :

> " In our opinion, the Tribunal must, in any event, look to the pleadings of the parties to find out the exact nature of the dispute, because in most cases the order of reference is so cryptic that it is impossible to cull out therefrom the various points about which the parties were at variance leading to the trouble."

In the instant case, it has to be noted that the contesting third respondent (The National Textile Workers Union) was all the while demanding rotation of the 82 workers along with the permanent workers in case of lay off and on that issue, there was a strike in the Mills from 10th June, 1974. Therefore, as the Supreme Court pointed out, it became necessary for the Labour Court to find out the exact nature of the dispute, notwithstanding the somewhat ambiguous wording of the reference.

13. The law relating to this aspect of the matter has been succinctly laid down in *Express Newspapers* v. *Their Workers and Staff*[1]:

> "An order of reference hastily drawn or drawn in a casual manner often gives rise to unnecessary disputes and thereby prolongs the life of industrial adjudication which must always be avoided. Even so, when the question of this kind is raised before the Courts, the Courts must attempt to construe the reference not too technically or in a pedantic manner, but fairly and reasonably".

14. In the impugned order, this is precisely what the Labour Court has done and this ruling is of great assistance to the respondents.

15. To the same effect is the decision in *Minimax* v. *Its Workers*[2], wherein it was held that a duty was cast on the Tribunal to find out the real dispute referred to and decide it and not to throw it out on mere technicality. It was further held that there was no substance in the submission that the Tribunal has no power to construe the referrence and to look into the pleadings of parties for the purpose.

16. The learned counsel for the contesting respondent is correct in his submission that if the lay off is to be confined to these 22 workers alone, there will be two categories of workmen, which will bring about discrimination among the same category of workmen, all of whom had attained the stature of permanency. This apart, if the interpretation placed by the writ petitioner is to be accepted, the lay off will have to be confined only to the 22 workers, who would be subjected to lay off in quicker rotation, while the other permanent workers would not be subject to lay off at all. On the contrary, if these 82 workers are to be laid off in rotation along with the other permanent workers the lay off will be confined to a shorter period, which undoubtedly will avoid industrial unrest.

17. The essential policy underlying the Act is to maintain industrial harmony

1. 229 : (1968) 1 S.C.J. A.I.R. 1967 S.C. 469.

1. (1962) 2 L.L.J. 227 : (1963) 3 S.C.R. 548.
2. (1968) 1 L.L.J. 369.

and avoid disputes and it was, therefore, necessary, for the Labour Court to decide the manner in which the 82 workmen had to be laid off, by saying that they had to be laid off along with the other permanent workmen. In so doing, it has not tread beyond the scope of its reference, but it has decided only the real dispute between the parties. Thus, I am unable to see any error whatsoever, in the impugned order.

18. The writ petition fails and it is accordingly dismissed. However, I make no orders as to costs. It will be open to the management to implement the award, now that the order of the Labour Court has been upheld.

S.J. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, J.*

Jayarama Iyer and others . .*Petitioners**

v.

S. Ramanatha Iyer and another . . *Respondents.*

(A) *Evidence Act* (*I of* 1872), *section* 62 Explanation I—*Deed of dissolution of partnership—Copy signed by all parties—Admissibility—Counter-part—Meaning.*

(B) *Stamp Act* (*II of* 1899), *First Schedule, Article* 25—*Unstamped counter-part—Validation.*

Where a document, though a copy of the original, had been signed by every one of the partners and had been handed over to each one of them to be kept as a document inducing the agreement for dissolution, it can be held to be a counterpart coming under section 62 of the Evidence Act and as such the same can be admitted in evidence. [*Para.* 4.]

When a deed is prepared in two or more identical forms, the part signed by the grantor is the original, the other parts are counter-parts. A counter-part can satisfy all the requirements of a copy. But at the time, it can be a counterpart instead of a copy, if the other conditions such as those mentioned in section 62 of the Evidence Act are satisfied. [*Para.* 4.]

Article 25 of the First Schedule to the Stamp Act simply states the stamp duty payable on a counter-part or a duplicate. Hence an unstamped counterpart can be validated by payment of proper stamp duty and penalty therefor. [*Para.* 3.]

Petition under section 115 of the Civil Procedure Code, praying the High Court to revise the order of the Court of the Subordinate Judge of Nagapattinam, dated 3rd May, 1975 and made in O.S. No. 93 of 1974.

A. Sundaram Iyer for *K. Sarvabhauman* for Petitioners.

R. Krishnamurthy, for Respondents.

The Court made the following.

ORDER.—This civil revision petition arise out of the order passed by the Subordinate Judge of Nagapattinam on 3rd May, 1975 in O.S. No. 83 of 1974 on his file, regarding the admissibility of a document dated 1st November, 1973 brought into existence by the plaintiffs and the defendants in the suit.

2. The plaintiffs have come forward with the suit for declaration that the partnership business conducted by the plaintiffs and the defendants under the name and style of Visalakshi Transports has been dissolved and for directing the accounts of the partnership to be taken in terms of the dissolution agreement. The first plaintiff has been examined as P.W. 1 and through him, the plaintiffs seek to exhibit a deed of dissolution of the partnership brought into existence by the plaintiffs and the defendants on 1st November, 1973. The defendants object to the marking of the said document as an exhibit on the ground that as the document now relied on by the plaintiffs is not the original deed of dissolution of the partnership and has not been duly stamped, a copy of the same cannot be marked at all. The plaintiffs' argue that "where a document is executed in counter-parts, each

*C.R.P. No. 1310 of 1975. 8th September. 1975.

counter-part being executed by one or some of the parties only, each counter-part is primary evidence as against the parties executing it. From this, the learned counsel submitted that the document can be admitted in evidence and since the necessary stamp duty and penalty have been collected, there is no difficulty for the Court to place reliance on this document.

3. Mr. R. Krishnamurthi, learned counsel appearing for the respondents, submitted that the original is with the plaintiffs, that they have not produced the same, that the document sought to be produced now is only a copy and cannot be a counter-part as envisaged in section 62 of the Evidence Act and that the same cannot be exhibited. He also referred to the meaning given in Venkatarama Aiyah's Law Lexicon for the term "Counter-part" and also to Article 25 of the First Schedule to the Indian Stamp Act. As far as Article 25 of the First Schedule to the Indian Stamp Act is concerned, it simply states the stamp duty payable on a counter-part or a duplicate. Hence, an unstamped counter-part can be validated by payment of proper stamp duty and penalty, therefor. In this case, the petitioners have paid both the stamp duty and the penalty as per the direction given by the trial Court on its administrative side.

4. As regards the meaning of "counter-part", Venkatarama Aiyah's Law Lexicon gives it as, "duplicate; when a deed is prepared in two or more identical forms, the part signed by the grantor is the original, the other parts are counter-parts". As far as the present case is concerned, all the five documents are signed by all the parties concerned, and the only difference is that except one document which has been written on stamp papers of the value of Rs. 2-50P. the other documents have been written on plain white paper. Venkatarama Aiyah's Law Lexicon defines a "copy" as follows: "When a document is an accurate and full reproduction of the original it would be a copy". A counter-part will satisfy all the requirements of a copy. But, at the same time, it can be a counter-part instead of those mentioned in section 62 of the Evidence Act are satisfied. Mr. Krishnamurthi brought to my notice section 63 of the Evidence Act, wherein, secondary evidence is stated to include copies referred to therein. Definitely, the present document will not come under any one of the categories mentioned in section 63 of the Evidence Act inasmuch this document, though a copy of the original, has been signed by every one of the partners and has been handed over to each one of the partners to be kept as a document evidencing the agreement for dissolution. Thus, it is clear from the facts of the present case that the document now sought to be produced can be easily stated to be a counter-part coming under section 62 of the Evidence Act and as such, the same can be admitted in evidence. The petitioners have also paid the necessary stamp duty and penalty therefore and as such, the document can be straightway taken in as admissible in evidence. With these findings, the civil revision petition is allowed. There will be no order as to costs.

R.S. ——— *Revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*V. Ramaswami, J.*

The Madras Co-operative Printing and Publishing Society Ltd., Madras, represented by its Secretary .. *Petitioner**

v.

O. Ramalingam and others .. *Respondents.*

Professional Ethics—Co-operative Society—Dispute between management and employees—Matter pending before Labour Court—Advocate for management and employees signing compromise—Award published—Award challenged by management on the ground that their Advocate was not authorised to enter into compromise—Whether tenable.

In a dispute pending before a labour Court, the counsel for management and

*W.P. No. 588 of 1974. 10*th September,* 1975.

employees signed a compromise and an award was passed. The management challenged the award on the ground that their counsel was not authorised to enter into a compromise.

Held, it is well-settled that counsel appearing for a party is always having an implied authority to enter into a compromise on behalf of his party. The only limitation is that if there was any written prohibition or limitation, he will have to act within that prohibition or limitation. [*Para*. 2.]

Cases referred to:—

Shrimati Jamitabi Abdul Kadar v. *Shankarlal Gulabchand and others*, C.A.No. 43 of 1968 (S.C.).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 92 of 1971 dated 26th December, 1973, on the file of the Additional Labour Court, Madras, and quash its Award in Supplement to Part II Election II Tamil Nadu Government Gazette dated 30th January, 1974 printed at pages 27 to 30.

R. Nadanasabapathy for *S. K. Rajavelu*, for Petitioner.

A.L. Somayaji, for Respondents 1 and 2.

The Court made the following

ORDER.—This is a petition for the issue of a writ of *certiorari* to quash the order of the Additional Labour Court, Madras in I.D. No. 92 of 1971. The facts leading to the filing of this writ petition are as follows: The first respondent was the President of the petitioner-society till 30th June, 1969. He was also the editor of a Daily which is a publication of the petitioner. The second respondent was the news-editor of that Daily. The first respondent was removed from the office of President of the Society and one Sourirajulu was elected as the President. It appears that there was no love lost between the new president and the two respondents. Ultimately it led to some disciplinary action by the petitioner against the respondents and an enquiry officer was appointed by the petitioner. But, unfortunately the enquiry officer could not conclude his enquiry which was, according to the petitioner, due to the unhelpful attitude of the respondents. In view of the report of the enquiry officer, the management demoted the respondents to a lower post. But the respondents failed to report to duty on and from 22nd June, 1971 which ultimately led to their dismissal on 28th June, 1971. The dispute about their dismissal and non-employment was the subject-matter of conciliation proceedings and on the failure report, the Government referred the dispute to the Labour Court by its order dated 20th July, 1971. The issue referred to reads as follows:—

"Whether the non-employment of O. Ramalingam and M. Shanmugavel is justified, and if not, to what relief they were entitled to; and

(*b*) to compute the relief, if any to be awarded in terms of money if it could be computed."

The above reference was taken on file by the Additional Labour Court, Madras, in I.D. No. 92 of 1971. On 18th July 1973, a compromise memo. was signed by the counsel for parties. The compromise memo.reads as follows:

"A. The management is agreeable to rescind the order of termination dated 30th June, 1971 terminating the service of Messrs. O. Ramalingam and M. Shanmugavel on the understanding that the latter would not press for reinstatement but would be willing to take compensation in lieu of reinstatement.

B. The quantum of compensation in lieu of reinstatement, would be decided by the Additional Labour Court.

C. The reliefs to be granted to Mr. O. Ramalingam would be decided by the Additional Labour Court after the disposal of W.J. No. 3 of 1972.

D. Both the parties agree to apply to the Government or the Additional Labour Court for transferring the W.J. No. 3 of 1972 to the file of the Additional Labour Court from the file of the Principal Labour Court so as to decide the question of relief to be granted to O. Ramalingam."

This compromise memo. was filed before the Additional Labour Court, Madras. It may be mentioned that W.J. No. 3 of 1972 which is referred to in the compromise memo. related to the payment of dearness allowance to the first respondent which was pending before the Principal Labour Court, Madras. In pursuance of this compromise, on a petition filed by the respondents, the Government, in G.O.Ms. No. 696 dated 30th October, 1973. transferred W.J. No. 3 of 1972 from the Principal Labour Court, to the First Additional Labour Court, Madras. For giving effect to the compromise and for deciding the compensation to be paid in lieu of reinstatement, an enquiry was conducted by the Additional Labour Court. The enquiry was held on 15th December, 1973 when the first respondent was examined as a witness. Number of documents were filed on behalf of the respondents. On behalf of the petitioner also three exhibits were filed. Oral arguments were addressed on 22nd December, 1973 and the award was made on 26th December, 1973. The award was published on 10th January, 1974. It is to quash this award the present writ petition has been filed.

2. Though the petitioner had raised a number of objections in the affidavit, the learned counsel for the petitioner, before me, confined himself to four of those objections. The first submission of the learned counsel for the petitioner was that the compromise entered into and filed in Court on 18th July, 1973 was not valid in law. This was on the ground that the counsel appearing for the management, the petitioner, was not given any authorisation to enter into a compromise and that the petitioner was also not aware of the compromise. This allegation is denied by the respondents in their counter-affidavit. They have stated that in the enquiry held subsequent to the compromise to give effect to the terms thereof, Sourirajulu, the deponent to the affidavit filed in support of the writ petition was actually present and was instructing his advocate and in fact, on the basis of the instructions only, the first respondent was cross-examined when he was in the box. They also stated that even on the date of the arguments, the said Sourirajulu, the President of the Society was present. After filing this counter-affidavit, the learned counsel for the respondents wrote a letter to the learned counsel who represented the management before the Labour Court, drawing his attention to the allegations in the affidavit filed in support of the writ petition and asking for his remarks, if any. The advocate who is a senior counsel of this Bar has written in his letter that it is Sourirajulu, the deponent to the affidavit filed in support of the writ petition who had instructed him to enter into the compromise, that he was aware of the compromise and that as soon as the compromise was signed, he was also informed of the same. He had also confirmed the statement in the counter-affidavit that the said Sourirajulu was present when the documents were filed and oral evidence was taken on 15th December, 1973 and also when the arguments were advanced on 22nd December, 1973. Inspite of the counter-affidavit and the letter of the advocate which was actually addressed to the petitioner with a copy marked to the learned counsel for the respondents, no reply affidavit was filed by the petitioner controverting the allegations in the counter-affidavit and the letter of the learned counsel. I am, therefore, fully satisfied that the counsel who appeared for the management before the Labour Court had the express authority of the management to enter into compromise and the allegation in the affidavit filed in support of the petition, to say the least, is incorrect and unfounded. The learned counsel for the petitioner even went to the extent of stating a preposterous proposition that a counsel appearing in a case could not act on the oral instructions of his party and that he could enter into a compromise only on the written authorisation. On the other hand, it is well settled that a counsel appearing for a party is always having an implied authority to enter into a compromise on behalf of his party. The only limitation is that if there was any written prohibition or limitation, he will have to act within that prohibition or limitation. As pointed out by the Supreme Court in *Shrimati Jamilabi*

Abdul Kadar v. *Shankarlal Gulabchand and others*[1], barring the lack of good faith, implied authority of a counsel to enter into a compromise could not be denied in India. Therefore, both legally and in fact, the counsel who appeared for the management before the Labour Court, had the necessary authority to enter into the compromise and the compromise is legal, valid and binding on the management.

3. It was next contended by the learned counsel for the petitioner that the Labour Court had not given any finding that the compromise was just, reasonable, proper and in the interest of the management of the petitioner-society and in the absence of any such finding, the award could not be made on the basis of such a compromise. In meeting this argument, the learned counsel for the respondents submitted that this is a case of compromise and not a settlement, which requires an interference of the Court on the question of reasonableness. Only in the case of settlements, the Courts have held that the reasonableness of the settlement will have to be gone into by the Labour Court. The respondents also contended that all the cases which dealt with the matter of justness and reasonableness of the compromise related to the workers' claim that the compromise was not valid and not to cases like individual disputes as in this case. In other words, it is only where the settlement binds a large number of workmen and the compromise is entered into by a representative of the workmen, the Labour Court is bound to look into the justness and reasonableness of the settlement and not otherwise. It is not for me to go into these respective contentions as I have already found that it is the deponent to the affidavit filed in support of the petition who had instructed the learned counsel appearing for the management, to enter into the compromise and he took part in the subsequent proceedings which were held in pursuance of that compromise. It is not open to him to question the compromise or otherwise to invalidate the same. I may also point out that it was not the case of the petitioner's counsel and in any case, though there is some allegation in the affidavit, he did not choose to argue before me that the compromise was in any way unreasonable or not just. There is, therefore, no substance in this contention of the learned counsel for the petitioner.

4. It was next contended by the learned counsel for the petitioner that the compromise itself suffers from lack of clarity and it is unenforceable for vagueness. In support of this argument, the learned counsel for the petitioner, relied on the first clause of the compromise which has already been set out. According to him, there is no reference to the date from which the compensation in lieu of reinstatement is to be paid and in fact, the Labour Court had to make a reference to this and ultimately find that the compensation will have to be ascertained as on the date of the compromise. There is no substance in this contention of the petitioner either. There was a dismissal order which, by the compromise, has been rescinded and which means that the respondents shall be deemed to have been in service till the date of compromise. Certainly, therefore, the compensation will have to be ascertained as on the date of the compromise. Further, the compensation is related to a number of other factors which we need not refer to here. On the basis of the relevant factors, the Labour Court had fixed the compensation payable. I am, therefore, unable to accept this contention of the petitioner.

5. Lastly, it was contended by the learned counsel for the petitioner that one of the amounts that was directed to be paid was the share capital held by the respondents in the co-operative society. According to the learned counsel, there was no reference to this matter to the Labour Court and therefore the Court had acted beyond its jurisdiction. Further it is stated that the repayment of the share capital is governed by bye-law 8 of the Society and if any dispute arises with regard to the repayment of share capital, it will have to be decided by the Registrar of Co-operative Societies and it could not be a subject-matter of dispute before the Labour Court. Be that as it may, I

1. C.A. No. 43 of 1968 (S.C.).

find that the amount was directed to be returned on the basis that the management had no objection for repayment of the same. When once I do not accept the contention of the petitioner that the petitioner was not aware of the compromise or the further proceedings, the fact that there was no objection shows that he could not question it in these proceedings under Article 226. Further, it has not been challenged in the affidavit that the management did not give any consent for the repayment of the money. They were amounts belonging to the respondents and they are entitled to the same and no onerous obligation is cast by reason thereof. No other ground was raised at the time of argument. For these reasons, the writ petition is liable to be dismissed.

6. The learned counsel for the respondents contended that in view of the fact that in the affidavit, false allegations have been made against a leading counsel of this Bar and the respondents, that is a matter in which exemplary costs are allowable to the respondents. It is true that the petitioner has suppressed material facts of his presence in Court at the time of enquiry on 15th December, 1973 and on 22nd December, 1973 and also the fact that he had instructed the counsel to enter into the compromise. These are very serious matters which does call for at least a strong disapproval of the conduct of the petitioner. Though no exemplary costs could be given, certainly the respondents are entitled to their costs in this writ petition. The writ petition is accordingly dismissed with costs. Counsel fee Rs. 150. The rule *nisi* is discharged.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

K. Venkataramanujam and others .. *Appellants**

v.

P. T. Parthasarathi and others .. *Respondents.*

Limitation Act (XXXVI of 1963), Articles 58, 107—Suit for declaration—Trust properties—Plaintiff claiming joint possession and management—Whether barred by limitation.

The plaintiff claimed in 1949 that he was entitled to joint possession and management of certain trust properties along with the first defendant and that he would enforce his rights thereto without any further reference. However he filed a suit only in 1966. On the question whether the suit was barred by limitation, the trial Court held that the suit was within time. On appeal,

Held: It being clear that the trustees in management had even long before 1949, taken possession of the office to the exclusion of the plaintiff virtually ousting him and been confirmed in possession for well over the statutory period and the plaintiff not having filed the suit within 12 years from the date when the defendant took possession adversely to him, the suit was barred by limitation under Article 107, Article 58 is only a residuary Article in Part III of the Limitation Act.

Even assuming that this is a case of succession to office within the meaning of section 6 (*ii*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, the suit is barred by limitation.

[*Para.* 10.]

Appeals against the decree of the Court of the Additional Subordinate Judge, Ramanathapuram at Madurai dated the 12th day of February, 1969 and passed in O.S. No. 56 of 1966, and Appeal against the decree of the Court of the

* Appeal Nos. 12 and 422 of 1975.

21st March, 1975.

Subordinate Judge, Kancheepuram dated the 3rd day of October, 1970 and passed in O.S. No. 85 of 1969.

V. Balasubramaniam and *V. Kunchithapatham*, for Appellants.

M. S. Parthasarathy Ayyangar, P. Krishnamachari, T. R. Srinivasan, K. Ramamurthi, O. C. Krishnamurthi and *M. V. Krishnan*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The first defendant in O.S. No. 56 of 1966 on the file of the Subordinate Judge's Court, Ramanathapuram, is the appellant. The plaintiff sued for declaration that he was entitled to be in joint possession along with the first defendant of the plaint schedule properties and for a direction that he be put in joint possession of those properties along with him and for a consequential accounting of the income from the properties for a period of three years prior to suit. Sri Boni Narayana Pillai Charity was created several years ago and amongst various properties endowed for the charity, there was an inam village which was taken over by the Government under the Estates Abolition Act. But it is common ground that from the compensation amount a Tasdiq allowance for the upkeep and maintenance of the charity as described in the third schedule to the plaint is being paid annually. Apart from the inam village, there are pannai lands, the patta for which was issued in the name of the trustees for the time being and they are included in the second schedule. The first schedule enumerates the houses endowed to the charity. Originally one Perundevi Ammal was managing the charities. Under her will and as she was competent to nominate the succeeding trustee, she nominated her son-in-law Venkatanarayana Pillai, who in turn under his will appointed one Parthasarathy Pillai, Kothandarama Pillai and Athilakshmi as executors. The nature of the trust was challenged by one Srinivasa Pillai in C.S. No. 439 of 1928 on the file of the High Court, Madras, who claimed all the properties attached to the trust as his properties. This suit was resisted. Finally, it ended in a compromise. Under the provisions of the trust deed, certain properties were situate in Madras, but were solely intended for the purpose of performing certain kattalais in Sri Parthasarathyswamy Temple in Triplicane. Pursuant to this, a scheme suit C. S. No. 1 of 1933 on the file of the High Court, Madras was filed by the trustees of Sri Parthasarathyswamy Temple. Whilst the scheme suit was pending C.S. No. 439 of 1928 was compromised. A provision therefore, was made in the said compromise decree itself in respect of the properties covered by C.S. No. 1 of 1933. The scheme suit was decreed and the properties went out of the management of the members of the family, but the temple honours alone were enjoyed by the members of the family. The plaintiff states that he is receiving such honours from Sri Parthasarathyswami Temple. Under the compromise decree in C.S. No. 439 of 1928, T. K. Thiruvengadam Pillai and Ranga Pillai acted as trustees of the charities and were managing the trust properties. Thiruvengadam Pillai died leaving a will dated 22nd October, 1941 whereunder the plaintiff was nominated as his successor. When the plaintiff sought probate of the suit will it was granted on 27th February, 1947. The first defendant, who is the son of Ranga Pillai sought to recall the probate which was granted. But again after enquiry the probate was granted to the plaintiff. The appeal against that order was unsuccessful. The plaintiff says that apart from the will, as the original heir of Thiruvengadam Pillai, he is entitled to be a trustee of the charities and as the first defendant is in sole management thereof, he has come to Court seeking for the reliefs already mentioned. He has impleaded the second defendant, who is said to be colluding with the first defendant and who is also said to be interested in ousting the plaintiff from management of the trust properties. It is claimed that the second defendant is only an intermeddler. The plaintiff accuses the defendants as persons who are not interested in performing the charities in accordance with the wills of Perundevi Ammal and Venkatanarayana Pillai. It is in these circumstances, that he filed the suit.

2. In the written statement of the first defendant it is hesitantly claimed that the plaintiff is not a representative of the branch of Srinivasa Pillai and that he is receiving the honours from Sri Parthasarathyswamy Temple not in pursuance of any right in him, but due to the mistake committed be the temple authorities. This defendant says that the plaintiff cannot claim any rights under the alleged will of Thiruvengadam Pillai and, therefore the suit is baseless. The collusion alleged between defendants 1 and 2 is denied and it is said that the trust is being performed as usual by the second defendant, who is in charge of carrying out the charities as the agent of this defendant. The other allegations noted in the plaint are denied, and lastly it is said that the suit is barred by limitation.

3. The second defendant in his written statement says that the plaintiff has no cause of action at all to institute the suit and in other respects adopts the written statement of the first defendant.

4. The third defendant, who is in possession of the trust as lessee sails with the first defendant.

Defendants 4 to 6 remained *ex parte.*

On the above material pleadings the following issues were framed:

1. Is the plaintiff a representative of the branch of Srinivasa Pillai ?

2. Is he entitled to claim joint possession of the suit properties either in his capacity as such representative or as a nominee under the will of late Thiruvengadam Pillai ?

3. Is the suit barred by limitation ?

4. Is the suit property item 1 the property of 'Boni Narayana Pillai Charity' and if not, is the plaintiff entitled to claim joint possession thereof?

5. Whether the plaint discloses cause of action against third defendant?

6. To what relief is the plaintiff entitled?

5. The learned Judge found the first two issues in favour of the plaintiff and held that he is a representative of the branch of Srinivasan Pillai and he is entitled to claim joint possession of the suit properties either in his capacity as such representative or as nominee under the will of late Thiruvengadam Pillai. On issue No. 3, he held that the suit was not barred by limitation. He found issues 4 and 5 in favour of the plaintiff and decreed the suit.

5-A. Mr. Balasubramaniam, the learned counsel for the appellant mainly rested his argument on the plea that the suit is barred by limitation. In the view that we intend taking in the matter, it would be sufficient to rest out discussion on the arguments of counsel relating to the issue on limitation, for if this is held against the plaintiff, then even though the findings of the trial Court on the other issues have to be accepted by us, it would not make any difference. We shall now therefore, deal with the plea as to bar of the suit by the law of limitation as urged by the appellant-first defendant.

6. Thiruvengadam Pillai, who appointed the plaintiff under his will dated 22nd October, 1941 died issueless on 26th November, 1945. The probate was granted to the will on 27th February, 1947. The appellate Court in Appeal No. 66 of 1954 in which the grant of the probate was questioned, dismissed the appeal on the ground that the caveator had no caveatable interest to oppose the grant of a probate to the will. Ranga Pillai died in 1952. Thereafter, it is common ground that the first defendant was in sole management of the trust properties as the sole trustee with the assistance of the second defendant as the actual manager thereof. The suit is for declaration that the plaintiff is entitled to be in joint possession of the trust properties as such trustee along with the first defendant and for a direction that he be put in joint possession of these properties. This was filed on 11th June, 1966. On the above relevant and admitted facts the learned counsel for the appellant maintains that Article 58 of the Indian Limitation Act, which is the residuary article in the matter of obtaining declarations applies and says that the suit not having been filed within three years from the date when the right to sue first accrued, it is barred. Refer-

ence is also made to Article 107 which provides that a suit for possession of a hereditary office has to be instituted within 12 years from the date when the first defendant takes possession of the office adversely to the plaintiff. The relevant Article 124 was the old article in this respect. It is contended that the trusteeship of this trust is not a hereditary office and Article 107 of the Limitation Act may not be attracted at all.

7. On the other hand, Mr. T. R. Srinivasam, would say that the suit is not barred by limitation and that Article 107 alone would apply. He would contend that the suit is not a suit for a bare declaration but being coupled with a relief for possession Article 58 would not apply. The suit has to be interpreted as a suit for possession in the main and that, therefore, the suit is in time.

8. At this stage it is useful to refer to the prior porceedings between the parties. C. S. No. 439 of 1928 was a suit instituted by one Srinivasa Pillai in which he sought for possession of the trust properties as a person, who was solely entitled to it. To that suit all the necessary claimants were made parties. This was ultimately compromised. The plaintiff therein—Srinivasa Pillai, representing his branch (of the family consisting of himself and Thiruvengadam Pillai and Ramakrishna Pillai) and the sixth defendant therein representing his branch (consisting of himself and Ranga Pillai) were made the joint trustees of the charities in question and they were put in joint possession of the properties and were obliged to perform the charities as directed in the Wills of Venkatanarayana Pillai and Perundevi Ammal. Clause 4 in the said compromise deed says that on the death of either the plaintiff or defendant 6 herein, the seniormost in age in their respective families defendants 5 and 7 or their representatives, if they are not living then, shall succeed to the possession and management of the said propeties set out in schedule hereto and be co-opted with the survivor and they shall hold the said properties and manage them as specified in the scheme. A reference was also made to the proceedings in C.S. No. 1 of 1933 which we shall presently refer to. The first defendant in this suit is the son of Ranga Pillai The plaintiff in this suit is the nominee of Thiruvengadam Pillai, who died leaving a will nominating the plaintiff as his successor. We have already referred to the fact that a probate of this will was granted by this Court in T.O.S. No. 12 of 1951—O.P. No. 37 of 1947 on the file of the High Court, Madras. An appeal as against this judgment of the original side by the first defendant in the suit was dismissed by Rajamannar, C J. and Ganapathia Pillai, J., in O.S. A. No. 66 of 1954 on the ground that the first defendant K. Venkataramanujam did not have a *locus standi* to file the caveat. Whilst this was the position, there was correspondence between the plaintiff in this action and the other parties interested in the charities during the year 1946. Exhibits B-3 and B-4 are very important letters, which were exchanged between the plaintiff on the one hand and the widow of Thiruvengadam Pillai and the defendant on the other. In Exhibit B-3 apparently Thiruvengadam's widow, challenged the will also. Even from Exhibit B-3, it is clear that the plaintiff by then did not secure possession of the trust properties nor was he in management thereof. Even in the affidavit filed by him in support of his application for the grant of probate, he would allege that he was entitled to the right to manage the trust and that he was entitled to joint management of the properties attached to the trust. Exhibit B-4 is a more clinching letter. This was addressed to Ranga Pillai and his agent. In this notice, the plaintiff unconditionally acknowledges that Ranga Pillai and Thiruvengadam Pillai were in joint possession and management and that a local person was appointed as the manager of the trust. He refers to the will of Thiruvengadam Pillai and affirms that consequent on the grant of the probate, he was entitled to be in joint possession. He accuses Ranga Pillai of wasting the corpus and charges him with misappropriation of trust funds and claims that he is not only the joint huqdar and trustee entitled to be in joint possession and management of the proportion but that he was one who was entitled to see to the proper performance of the charities

as a member of the family. His counsel finally wrote in Exhibit B-4 as follows:

> "When my client called upon to you account, the first of you put in a spurious plea that you do not recognise my client's right............... My client hereby gives both of you final notice that both of you are liable to account to my client for the management upto date and that my client is entitled to joint management, and possession and he will enforce his rights thereto without any further reference".

Exhibit B-4 is dated 4th March, 1949. The plaintiff, examined himself as P.W. 1, relies upon the othies created by him over two items of the trust properties and also refers to the fact that he was getting the honours in the Parthasarathyswamy Temple as a representative of the family under the scheme framed by the High Court in C.S. No. 1 of 1933 already referred to. He would say that the first defendant did not object to such honours and would add that he did not send any notice saying that he had no right in the trust. He admits that the first defendant filed O.S. No. 105 of 1962 on the file of the Court of the District Munsiff, Srivilliputhur challenging the othis made by the plaintiff. He would say that he had to mortgage properties in order to obtain money for probating the will of Thiruvengadam Pillai. It is in the context of the above admitted facts that the plea of limitation has to be considered.

9. The fact that Sri Parthasarathyswamy Temple was honouring the plaintiff by itself would not create any right. If such honours were given by the temple authorities under a mistake, that would not by itself whittle down the legal right obtained by the first defendant to challenge the present action of the plaintiff for joint possession of the trust properties. Mere conferment of temple honours would only mean the gaining of a privilege as long as it does not flow from a right of a vested and recognised office of trusteeship, such a privilege even if obtained by the plaintiff from the Parthasarathyswamy Temple will not improve matters. If the suit by the plaintiff for joint possession and for declaration asked for is barred in law on the date when he filed it, then the recognition of such a right under a mistake of law and fact by third parties would not bind the defendant. We are unable to agree with the learned trial Judge that Exhibits A-9 to A-11 which are letters written by an agent to a trustee would tilt the legal position in the case. A claim that a person is entitled to be a trustee is far different from saying that he was functioning as trustee and was in possession of the properties attached to the trust. In fact we have referred to Exhibit B-4 dated 4th March, 1949 in which the plaintiff admits that he was seeking for possession of the suit properties and he would allege that he was taking steps to get his right declared. There is no evidence before us to show that the customary honours received by the plaintiff in the Sri Parthasarathyswamy Temple was in pursuance of a recognition given to the plaintiff as a trustee in possession of the charities.

10. It would be necessary, therefore to start with Exhibit B-4. In 1949 the plaintiff was not in possession of the suit properties, but on the other hand, he was very keenly agitating for such a right. He was kept out of the office by the defendants. The suit as framed by him is a suit for a declaration that he is entitled to be in joint possession along with the first defendant and for a direction that he may be put in joint possession of these properties. Assuming for argument's sake that on account of the age-old trust attached to these charities and the customary made of appointment of trustees to them the office of trusteeship is hereditary even than the question arises whether the suit is or is not barred by limitation. We are assuming this position having regard to the definition of hereditary trustee in section 6 (*ii*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. The contention of Mr. Balasubramaniam is that the office is not hereditary and, therefore Article 58 of the Limitation Act would apply and not Article 107. Article 58 is obviously a residuary article appearing in Part III of the schedule to the Limitation Act. The cause of action

for such a suit arises on the date when the right to sue first accrues. Taking Exhibit B-4 the right to sue for a declaration, such as the one now asked for is already stated to have accrued in favour of the plaintiff. But no action has been filed till 1966. Even assuming that the plaintiff was seeking for possession of a hereditary office, the question is whether the cause of action survived in 1966 to the plaintiff. The trend of the correspondence between the plaintiff and the trustees in management of the trust from time to time and particularly in 1949 shows that they have taken possession of the office to the exclusion of the plaintiff and so were in possession of the office adversely to the plaintiff. If he was, therefore, seeking a right to joint possession of such hereditary office, from which he was ousted, he should have filed a suit within 12 years from the date when the defendant took possession of the right adversely to the plaintiff. The language in Exhibit B-4 is unambiguous and clear. There is no allegation in Exhibit B-4 that the plaintiff was ever in joint management of the trust properties. As a matter of fact, every line in the said notice brings home the exclusion from such possession and a non-recognition of the plaintiff as a trustee thereto in spite of the nomination made by Thiruvengadam Pillai and in spite of the will of Thiruvengadam Pillai containing such nomination having been probated. The plaintiff claims in 1949 that he is entitled to joint possession and management and that he would enforce his rights without any further reference. Having said that, he files a suit only in 1966, long after the period of limitation. This is a case where the facts amply demonstrate that the other trustee excluded the plaintiff from management. It is no doubt true that a co-trustee cannot take advantage unless such possession is proved or demonstrated to be adevrse to the other trustees entitled to be in joint possession of the trust properties. But if a co-trustee virtually ousts another trustee from possession and continues in possession for well over the statutory period, then such a possession would be understood as possession adverse to that of the ousted trustee. It is unnecessary in this case to go into the question whether this is a case of succession to office within the meaning of section 6 (*ii*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act. Even assuming it is so, the suit is barred by limitation.

11. Article 58 provides a period of three years and Article 107 a period of 12 years. The plaintiff not having filed the suit within the longer of the periods allowed to him by law, the suit is undoubtedly barred by limitation.

12. On issue Nos. 1 and 2 we agree with the trial Court that the plaintiff should be be deemed to be a representative of the branch of Srinivasa Pillai within the meaning of the scheme decree referred to above and he would be entitled to claim joint possession of the suit properties either in his capacity as such representative or nominee under the will of late Thiruvengada Pillai. That the plaintiff was interesting himself in the proper administration of the trust cannot be denied. In fact he mortgaged certain charity properties in order to probate Thiruvengadam Pillai's will as early as 1947. He obtained permission from the High Court to mortgage the properties. A suit challenging the mortgage by the 1st defendant failed. Even so, an appeal thereon. We are not however concerned with these circumstances. The first defendant's application to recall the probate was ordered and he entered a caveat without success but later on the Division Bench characterised him as a person, who did not have any caveatable interest. The extreme contention of the first defendant that the plaintiff's father was not a member of the branch of Varadaraja Pillai was rightly discountenanced as even according to the relevant clause in the compromise decree in C.S. No. 439 of 1928, the plaintiff could be said to be a representative of the branch of Srinivasa Pillai. All these above relevant facts, which were noticed in detail by the trial Judge points out that the plaintiff is a person, who could claim to have a right to be in joint possession and enjoyment of the trust properties.

13. Even though we agree with the trial Judge on issues 1 and 2 and in view of the fact that we are unable to subscribe to the view that the suit is not barred by

limitation, in any view whatsoever, the appeal has to be allowed.

A.S. No. 422 *of* 1971.

14. This suit arises on almost the same facts but obviously relating to some of the properties belonging to the trust but situate within the jurisdiction of the Subordinate Judge of Kancheepuram. The pleadings are almost similar and one of the material contentions therein was, the suit was barred by limitation.

15. The learned Judge was of the view that there were no particulars placed before him to substantiate that the suit was barred by limitation and in that view he held the issues against the first defendant. But in A.S. No. 12 of 1970 a full argument was addressed before us and fuller materials were made available. In the view we have taken in A.S. No. 12 of 1970, the appeal A.S. No. 422 of 1971 also has to be allowed.

16. In these circumstances, both the appeals are allowed and there will be no order as to costs in both the appeals.

S.J. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Kandaswamy Gounder .. *Petitioner* :

v.

Vannimuthu Gounder and another .. *Respondents.*

(A) *Tamil Nadu Cultivating Tenants' Protection Act* (*XXV of* 1955)—*Purchaser of land—Petition for eviction—Allegation of waste—Notice sent through post—Returned with endorsement "refused"—Tenant set* ex parte *—Eviction ordered —Service of summons not sufficient—Order of eviction set aside.*

(B) *Civil Procedure Code* (*V of* 1908)—*Provisions relating to service of summons—Applicable to Revenue Courts.*

The provisions of the Code of Civil Procedure are in all force applicable to the service of summons in respect of parties before the Revenue Court. Order 5, rule 9 was amended on 27th March, 1963. Before amendment, Order 5, rule 9 (3), was more or less similar to Order 5, rule 9 (1), which is in force after amendment, except for the sentence "the acknowledgment purported to be signed by the defendant shall be deemed to be sufficient proof of service of such summons". In view of this provision before amendment of 1963, a Bench of our High Court refused to accept the service deemed to have been effected when especially there was an endorsement "refused" by the postman. [*Para.* 4.]

As the amendment stands today, in the case of service of summons as per Order 5, rule 9 (1), though served by registered post with pre-paid acknowledgment, the summons has to be sent again if the party does not appear on the date fixed in the summons. As far as the present case is concerned, there is no question of any service, as such, except the endorsement made by the postman stating that the party has refused to receive the summons. Hence it is clear that the service alleged to have been effected under Order 5, rule 9 (1), cannot be deemed to be proper service inasmuch as the petitioner ought to have followed the procedure mentioned in Order 5, rule 9 (2), also for the purpose of deciding that the service was complete. In the absence of that, the service is defective and as such, the *ex parte* order of eviction cannot be sustained. [*Para.* 5.]

Case referred to :—

Muthiah Nattar v. *N. S. Ibrahim Rowther*, (1967) 80 L.W. 419.

Petition under section 115 of Act V of 1908, read with section 6 (*b*) of the Madras Cultivating Tenants' Protection Act, 1955 praying the High Court to revise the Order of the Court of the Authorised Officer (L. Ref.) Coimbatore, dated 8th July, 1974 and made in O.P. No. 20 of 1972.

S. Ramalingam, for Petitioner.

S. Nainar Sundaram, for Respondents.

The Court made the following

ORDER.—The petitioner herein is a cultivating tenant. The respondents pur-

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* C.R.P. No. 2210 of 1974. 10*th October*, 1975.

chased the land and filed a petition for eviction on the ground of waste. Notice was sent through post and it came back with an endorsement "refused". The case was called on 8th February, 1972 and then it was adjourned to 22nd February, 1972. On 22nd February, 1972 the respondent in the eviction petition was called absent and he was set *ex parte*. An order of eviction was passed evicting the respondent forthwith. The respondent in this petition filed E.P. No. 6 of 1972 for execution. On 2nd August, 1972 the Tahsildar came and took forcible possession from the petitioner in this civil revision petition. Within two days thereafter the petitioner filed O.P. No. 20 of 1972 to set aside the *ex parte* order and also another petition for setting aside the order of eviction. On 14th August, 1972 the Authorised Officer (Land Reforms), Coimbatore, dismissed these petitions on the ground that delivery has already been taken and, as such, the petitions have become infructuous. Against the said order C.R.P. No. 2223 of 1972 was filed by the present petitioner and this High Court by its judgment, dated 11th July, 1973 held that the order passed by the Authorised Officer (Land Reforms) Coimbatore is wrong and, as such the High Court sent back the matter to the Authorised Officer directing him to decide the matter on merits. After it was sent back the Authorised Officer, holding that the service is proper and that the petitioner ceased to have any interest in the suit land, dismissed the original petition. Aggrieved by the said decision the tenant has filed the above civil revision petition.

2. Mr. S. Ramalingam, the learned counsel appearing for the petitioner pointed out that the service deemed to have been effected on the petitioner herein is not sufficient and, as such, the order of eviction passed *ex parte* cannot be sustained. It is further submitted that the petitioner came to know of the order of eviction passed only on 2nd August, 1972 when forcible eviction was made by the Tahsildar and that the petitioner within two days filed the present original petition to set aside the *ex parte* order of eviction passed against him. The learned counsel pointed out that rule 8 of the rules framed under the Act gives power to the Authorised Officer (Land Reforms) to apply the provisions of the Code of Civil Procedure as far as possible in respect of service of summons on the parties concerned. If that be so, the learned counsel submits that the Court below has not followed the procedure laid down in Order 5 of the Code of Civil Procedure in respect of service of summons on the respondent in the main eviction petition. Mr. Nainar Sundaram, the learned counsel appearing for the landlords — respondents herein submitted that the service effected on the respondent in the main eviction petition by post wherein the postman has made an endorsement to the effect that the petitioner in this revision petition has refused to receive the summons, is sufficient service and, as such, the order of eviction passed against the petitioner herein is valid. The learned counsel also submitted that the provisions of the Code of Civil Procedure cannot be applied in a strict form to the proceedings before the Rent Control Court. The wording is "as far as possible" in the Rule and, as such, the service must be deemed to be a proper service in this case. The learned counsel also stressed the point that the petitioner has ceased to have interest in the suit land, in as much as he has subleased the property to his brother Karuppuswamy and the said Karuppuswamy has also filed an independent suit to have possession of the suit land from the landlords as a cultivating tenant.

3. I have been taken through the pleadings in this case and also through the relevant provisions in the Tamil Nadu Cultivating Tenants' Protection Act, 1955, and the Rules made thereunder.

4. In *Muthiah Nattar* v. *N. S. Ibrahim Rowther* alias *N. S. Mohammed Ibrahim and another*[1], Ramaprasada Rao, J., has stated as follows :—

> "It is common ground that unless there is anything in the Madras Cultivating Tenants Protection Act or the rules prohibiting the application of any provisions of the Civil Procedure Code, the Code is applicable to the proceedings in the revenue Court. No doubt, the provisions of the Civil Procedure Code ought not to be strictly iron-jacketed and rendered inelastic."

1. (1967) 80 L.W. 419.

Thus, it is clear that the provisions of the Code of Civil Procedure are in all force applicable to the service of summons in respect of parties before the revenue Court. Order 5, rule 9 was amended on 27th March, 1963. Before amendment Order 5, rule 9 (3) was more or less similar to Order 5, rule 9 (1) which is in force after amendment, except for the sentence "the acknowledgment purported to be signed by the defendant shall be deemed to be sufficient proof of service of such summons." In view of this provision before amendment of 1963, a Bench of our High Court refused to accept the service deemed to have been effected when especially there is an endorsement "refused" by the postman.

5. As the amendment stands to-day, it is clear that the service of summons as per Order 5, rule 9 (1) though served by registered post with pre-paid acknowledgment, the summons has to be sent, again if the party does not appear on the date fixed in the summons. As far as the present case is concerned, there is no question of any service, as such, except the endorsement made by the postman stating that the party has refused to receive the summons. Hence, it is clear that the service alleged to have been effected under Order 5, rule 9 (1) cannot be deemed to be a proper service inasmuch as the petitioner ought to have followed the procedure mentioned in Order 5, rule 9 (2) also for the purpose of deciding that the service was complete. In the absence of that, it can easily be held that the service is defective and, as such, the *ex parte* order of eviction passed cannot be sustained.

6. As regards the contention that the petitioner has ceased to be the cultivating tenant to have the benefits of the Act, Mr. S. Ramalingam, the learned counsel pointed out that the suit filed by Karuppuswamy, the brother of the petitioner herein, alleging that he is a sub-tenant, has been dismissed by the Court below and there is no appeal against the same. Even apart from that the learned counsel submits that P.W. 1 in O.P. No. 20 of 1972 has specifically denied the sub-lease to his younger brother, Karuppuswamy. The definite case of the petitioner herein is that he has not sub-leased the property. Even apart from this, the main petition was filed by the landlords for the eviction of the petitioner on the ground of waste. Hence, it cannot be said that the petitioner herein has lost his interest simply because there is an allegation to the effect that he has sub-leased the property to his brother Karuppuswamy. Hence, I find that the petitioner is entitled to maintain the petition for setting aside the *ex parte* order of eviction passed against him.

7. It is unnecessary for me to deal with the case-law cited by the respective counsel in this petition, since it is clear from the facts of the case read with the provisions of the Code of Civil Procedure that th ons served upon the petitioner is defective and the *ex parte* order was passed against the petitioner herein without following the procedure laid down in the Code of Civil Procedure for service of summons on the respondent in the petition for eviction. Taking all these aspects into consideration I hold that the Authorised Officer (Land Revenue) has miserably failed to exercise his jurisdiction vested in him to give a finding.

8. In these circumstances, the Civil Revision Petition is allowed. The result is the *ex parte* order of eviction passed on 22nd February, 1972 is set-aside.

9. Since the *ex parte* order of eviction has been set aside, it is but proper that the petitioner must be put into possession of the land from which he has been evicted forcibly through the process of Court. This power is given to the High Court under section 6-BB of the Tamil Nadu Cultivating Tenants Protection Act. Mr. Nainar Sundaram states that his clients have cultivated the land and there may be some standing crops on the suit land.

10. The Authorised Officer is directed to put the petitioner in possession of the suit land after allowing the respondents to harvest the crops, if any, standing on the suit land. There will be no order as to costs. The Authorised Officer is also directed to dispose of the main eviction petition within a month from the date of the receipt of this order by him.

R.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

M. Nagalingam and others. .. *Petitioners**

v.

T. K. Ramaswamy Chettiar. .. *Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960), *sections* 10 (2) *and* 14 (1) (b)—*Landlord requiring premises for demolition and reconstruction—Petition for eviction of tenant—No valid notice—Eviction could not be ordered.*

(B) *Transfer of Property Act (IV of* 1882), *section* 106—*Statutory notice before filing petition for eviction—If necessary.*

As far as Rent Control applications are concerned, it is not the ownership of the property that entitles a person to file an eviction petition; but when a person comes under the definition of "landlord" mentioned in section 2 (6) of the Madras Act XVIII of 1960 he is entitled to file a petition for eviction. The denial of title contemplated under section 106 of the Transfer of Property Act when it is made applicable for any eviction prayed for under Madras Act XVIII of 1960, must be read to denote the denial of the right of the landlord to maintain the petition for eviction. [*Para.* 6]

If a landlord invokes the provisions of Madras Act XVIII of 1960, it is incumbent upon him to terminate the tenancy as per section 106 of the Transfer of Property Act, since he approaches the Court on the specific plea that the respondent in the eviction petition is his tenant. Notice under section 106 of the Transfer of Property Act is necessary for terminating the tenancy of a tenant before filing any eviction petition. [*Paras.* 6 *and* 7]

Cases referred to:—

Hashmat Husain v. *Saghir Ahmad*, A.I.R. 1958 All. 847; *Thangavelu* v. *Bhahadur Sheriff*, (1970) 83 L.W. 124; *Venkaji Krishna Nadkarani* v. *Lakshman Devji Kandar*, (1896) I.L.R. 20 Bom. 354.

Petition under section 25 of the Tamil Nadu Buildings, Lease and Rent Control Act (Tamil Nadu Act XVIII of 1960 as amended by Act XXIII 1973) praying the High Court to revise the Decree of the Court of the Small Causes (III Judge,) Madras dated 6th December, 1974 and passed in H.R.A.Nos. 385, 386 and 387 of 1974 (H.R.C.Nos.3061, 3062 and 3063 of 1972, Rent Controller (VI Judge), Court of Small Causes, Madras).

S. Kuppuswami, for Petitioner.

B. T. Seshadri, for Respondent.

The Court made the following

ORDER.—All these three Revision Petitions arise out of a common order passed in three different Rent Control applications, both by the Rent Controller and also by the Appellate Authority. The petitioner in those eviction petitions is the same. He filed the eviction petitions in respect of three different shops occupied by the different respondents therein under sections 10 (2) (7) and 14 (1) (*b*) of the Act.

2. The trial Court found that the requirement of the building for demolition and reconstruction under section 14 (1) (*b*) is *bona fide* but holding that there is no valid notice under section 106 of the Transfer of Property Act, dismisssed the eviction petitions. Aggrieved by the decision of the trial Court, the landlord preferred three Rent Control Appeals. The lower Appellate Court confirmed the finding as regards the *bona fide* requirement of the landlord is concerned for the purpose of demolition and reconstruction. On the ground of defective notice, the lower Appellate Court observed that the vague allegation of the petitioners herein to the effect that the landlord is not the absolute owner of the property will amount to denial of the landlord's title and as such, no notice under section 106 of the Transfer of Property Act is necessary. The lower Appellate Court also held that Exhibit P.9 and P.12 notice issued are valid and sufficient in law for filing the eviction petitions. With these observations, the lower Appellate Court ordered eviction. Aggrieved by the order passed by the

*C.R.P.Nos. 455 to 457 of 1975.
25th July, 1975.

lower Appellate Court, the petitioners in each of these Revision Petitions have filed independent Civil Revision Petitions which are numbered as C.R.Ps. Nos. 455 to 457 of 1975.

3. At the outset, I am convinced that the finding as regards the *bona fides* made by the Courts below is correct.

4. Mr. Kuppuswamy, the learned counsel appearing for the petitioner in each of these Revision Petitions submitted that the eviction petitions must fail for want of notice under section 106 of the Transfer of Property Act. For this purpose, he read the notices given by the landlord and also the reply, Exhibit P-14. According to the learned counsel, there is absolutely no denial of title by the tenants ; nor is there any evidence as regards the denial of title alleged by the respondent herein. Except pleading that the tenants have denied the title, the respondent has not proved whether there was such a denial. Hence, Mr. Kuppuswamy, the learned counsel submits that notice under section 106 of the Transfer of Property Act is necessary before filing any petition for eviction and since the respondent in each of the revision petitions failed to give such a notice, the eviction petitions ought to have been dismissed on this short ground alone. Mr. B.T. Seshadri, the learned counsel appearing for the respondent landlord, read to me the petitions and counter-statements filed in H.R.C. No.3062 of 1972 and also the petitions filed in the present Rent Control Applications for the purpose of establishing that the tenants have denied the title at least partially. According to the learned counsel, such a denial of title will disentitle the tenants to ask for notice under section 106 of the Transfer of Property Act. It is submitted that the notice issued must be construed as one under section 111 of the Transfer of Property Act inasmuch as the tenants have denied the title of the respondents herein.

5. To substantiate his contentions, Mr. B.T. Seshadri cited *Hashmat Husain* v. *Saghir Ahmad* [1], *Thangavelu* v. *Bahadur Sheriff* [2] and *Venkaji Krishna Nadkarni* v. *Lakshman Devji Kandar* [1]. As far as the Allahabad decision is concerned, the petition is not filed under the Rent Control Act but that is a suit in ejectment wherein the Bench of the Allahabad High Court held that partial denial of title will disentitle the tenant to ask for notice under section 106 of the Transfer of Property Act. The other two decisions cannot be made applicable to the facts of the present case.

6. The present application was filed under sections 10 (2) (7) and 14 (1) (*b*) of Madras Act XVIII of 1960. Section 14 (1) (*b*) is for demolition and reconstruction. Section 10 (2) (7) states that eviction can be ordered if the tenant has denied the title of the landlord or claimed a right of permanent tenancy and that such denial or claim was not *bona fide* . If such denial is not *bona fide* the Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he can make an order rejecting the application. It has been held by the Supreme Court that notice under section 106 of the Transfer of Property Act is necessary for terminating the tenancy of a tenant before filing any eviction petition. Except pleading that the tenants have denied the title of the respondent herein, the respondent has not proved the said allegation.

7 The reply notice and also the counter statements filed by the tenants, both in H.R.C. No. 3062 of 1972 and in the present applications, cannot be read as denial of title made by the tenants in this case. As far as the present applications for eviction are concerned, the tenants have specifically admitted that the respondent is the landlord but they have questioned the *bona fides* of the claim for demolition and reconstruction on various grounds such as that the property is a trust property, that the petitioner in the eviction petitions is one of the trustees and not the full owner of the trust property. As far as the Rent Control applications are concerned, it is not the ownership of the property that entitles a person to file an eviction petition but when a person comes under the definition of " landlord " mentioned in section 2 (6) of the Act, he is entitled to maintain a petition for eviction.

1. A.I.R. 1958 All 847.
2. (1970) 83 L.W. 124.

1. (1896) I.L.R. 20 Bom. 354.

The denail of title contemplated under ection 106 of the Transfer of Property Act, when it is made applicable for any eviction prayed for under Madras Act XVIII of 1960, must be read to denote the denial of the right of the landlord to maintain the petition for eviction. As far as the present case is concerned, the tenants never denied that the respondent herein is the landlord. On the other hand, they questioned only the *bona fides* of the claim of the respondent for demolition and reconstruction.

8. Even apart from this aspect of the case, if a landlord invokes the provisions of Madras Act XVIII of 1960, it is incumbent upon him to terminate the tenancy as per section 106 of the Transfer of Property Act, since he approaches the court on the specific plea that the respondent in the eviction petition is his tenant.

9. Taking all these aspects into consideration, I am of the view that the respondent in all these revision petitions has failed to give the statutory notice under section 106 of the Transfer of Property Act and as such, the eviction petitions have to be dismissed for want of notice.

10. In these circumstances, the revision petitions are allowed with the result that the order of the Rent Controller is restored. There will be no order as to costs in all these revision petitions.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

Krishnasamy Nadar and others. .. *Appellants**

v.

Subbayya Pillai and another .. *Respondents.*

(A) *Transfer of Property Act* (*IV of* 1882), *section* 105—*Lease*—*Lessee not in possession of property on the date of lease*—*Suit by lessee for recovery of possession*—*Maintainability.*

(B) *Words and Phrases*—Nudum pactum.

A lease is not a mere contract, but is a transfer of an interest in land and creates a right *in rem.* Such an interest is good against the whole world irrespective of notice. The lessee need not be in possession when he executed the lease and as lessee he can recover possession from a trespasser. [*Para.* 7.]

The question of *nudum pactum* would not arise in the case of a lease as it is not a mere contract. The lessee who has been let into the property can seek to recover possession against the person who is actually a trespasser. Any contrary conclusion would only leave an open field for trespassers to play upon. A lessee who is not in possession can maintain a suit for recovery of possession which he is entitled to. If he is not a person who has a valid lease in his favour, the question of his capacity to recover possession can be contested. [*Para.* 8.]

Appeal against the decree of the Court of Subordinate Judge, Mayuram in Appeal Suit No. 94 of 1971, preferred against the decree of the Court of the District Munsif of Sirkali in Original Suit No. 595 of 1968.

R.S. Venkatachari and *V. Muthuperumal*, for Appellants.

R. Thiagarajan and *D. Peter Francis*, for Respondents.

The Court delivered the following

JUDGMENT.—One Ammamuthu Ammal executed a will on 28th April, 1958 in respect of her properties. Briefly stated, in the will, she gave the properties covered by the present suit, to one Vitoba, the foster daughter, absolutely, after her life-time and after the life-time of her husband Govindaraju Chettiar. She died soon thereafter. The properties covered by the suit were to be in the management of her husband, Govindaraju Chettiar. The legatee, Vitoba was also to look after the said Govindaraju Chettiar during his lifetime. Govindaraju Chettiar is said to be presently living in a place called Seychelles. Where this place is, is not clear. Under the will, this place is referred to as being near Mahe. But, anyway, this need not deter further consideration of the facts of this case.

2. Govindaraju has got two agents in whose favour he has given power-of-at-

* S.A. No. 83 of 1973. 20*th August*, 1975.

torney. They are Kumarasami and Appadurai Chettiar respectively. The plaintiff as a lessee having executed a document in favour of the said power-of-attorney agents on 12th July, 1968 (Exhibit A-1). The first defendant claims to be a lessee under a lease deed executed on 10th April, 1968 (Exhibit B-1) in favour of Vitoba, the foster-daugher. The plaintiff, as the lessee from Govindaraju Chettiar or his agents, filed the suit for permanent injunction or, in the alternative for recovery of possession of the suit propeity and for future profits. He impleaded the first defendant who claims to be a lessee from Govindaraju and who interfered with his rights. The third defendant was Vitoba, the foster-daughter, the fourth defendant is her husband and the second defendant was impleaded because of some interest in the lands but he has disclaimed any interest therein.

3. The trial Court went into the question of the construction of the will and reading the will as a whole and the cumulative effect thereof, it held that a life-interest was given to Govindaraju Chettiar and that during his life-time he alone could be in possession of and management of the property. According to the trial Court, the interest taken by Vitoba, the foster-daughter, was only a vested remainder. Subsequent to the death of Ammamuthu Ammal, the testator, the trial Court's finding is that her husband, Govindaraju Chettiar, was in possession of the properties. It held that this was a case where the person who was entitled to possession of the property was ousted from possession and that the plaintiff was, therefore, entitled to recover possession from the defendants.

4. On appeal, the learned Subordinate Judge confirmed the conclusions of the trial Court on the construction of the will, *viz*., that Govindaraju Chettiar was entitled to a life estate. Though the plaintiff was not in possession as a lessee under Exhibit A-1, the will, the appellate Court held that he would be entitled to recovery of possession. It was also held that an alternative relief of recovery of possession should not be disallowed on the ground that the plaintiff would not be entitled to the relief of permanent injunction.

5. Having lost in both the Courts below, the defendants have filed this appeal. The learned counsel for the appellants submitted that under Exhibit A-4, the will, Govindaraju had only the right to manage the properties, that this was a right personal to him, that he could not delegate it to his agents and that, therefore he could not maintain the present suit for possession. On the construction of the will, the submission by the appellants was that there was no vesting of property in Govindaraju Chettiar, that he was not even a life-interest holder and that Vitoba, the foster daughter, had a vested right over the properties as a result of which she could exercise the power to grant a lease.

6. I have gone through the will as a whole. The learned District Munsif has extracted the relevant portion in paragraph 8 of his judgment. The interest of Govindaraju, the husband of the testator, is referred to in two places. At first it is stated that Vitoba should maintain or look after (பராமரித்து) the said Govindaraju Chettiar. It is also stated that after her life-time, her husband, Govindaraju Chettiar, should manage the properties. At the end of the will it is mentioned that the bequest contained under the will would come into effect after the life-time of herself and also her husband. Taking the will as a whole, I am satisfied that the concurrent construction of the two courts below *viz*., that Govindaraju had a life-interest in the properties is correct and the submission of the learned counsel for the appellants that he had no interst in any properties would have the result of partial intestacy during the life-time of Govindaraju Chettiar. It is settled law that a will should be so construed as to avoid any intestacy. The testator by executing the will is presumed to deal with the properties effectively from the time when the will comes into effect. As pointed out by the learned counsel for the respondents, if, really, there is any kind of intestacy, during that period it is Govindaraju who would be the heir of his wife and who would have the rights in the properties. Anyway, it is unnecessary to go into this aspect. Taking the will as a whole, and gathering the intention of the testator from the words used in the will, I am satisfied that the concurrent construc-

tion of the Courts below that Govindaraju Chettiar had life interest in the properties is the proper and reasonable one. There is absolutely no subsatance in the submission that the right to manage during his lifetime vested in Govindaraju Chettiar is only a personal right. Where a person is not in a position to immediately attend to the affairs of which he is put in charge under the will, he has necessarily, to carry out his charge through the mechanism of others. If the construction contended for by the appellants is to be accepted, then, the result would be that when once Govindaraju was away from the village, the properties covered by the will could be occupied by any one without any kind of protection whatsoever. It is not possible to accept this contention. The power-of-attorney agents are merely those persons who look after the properties on behalf of Govindaraju Chettiar when he was away, and therefore, there is nothing *per se* wrong in Govindaraju making arrangements for the management of the properties during the period of his absence, through his own agents.

7. The learned counsel for the appellants then, submitted that this is a case where possession was not with the plaintiff or any person through whom he claims. The Courts below have found that Govindaraju was in possession of the properties subsequent to his wife's death. The plaintiff has executed a lease in favour of Govindaraju through his power-of-attorney agents. As pointed out in Mulla's Transfer of Property Act, 6th Edition, page 645, a lease is not a mere contract, but is a transfer of an interest in land and creates a right in rem". Such an interest is good against the whole world irrespective of notice. The lessee need not be in possession when he executed the lease and as lessee he can recover possession from a trespasser.

8. The learned counsel for the appellants submitted that the lease was a *nudum pactum* because neither the lessor nor the lessee was in possession of the properties. The question of *nudum pactum* would not arise in case of leases as it is not a mere contract. The lessee who has been let into the property can seek to recover possession against the person who is actually a trespasser. Any contrary conclusion would only leave an open field for a trespasser to play upon. This cannot be encouraged and a lessee who is not in possession can maintain a suit for the purpose of recovery of possession which he is entitled to. If he is not a person who has a valid lease in his favour, then certainly the question of his capacity to recover possession can be contested. But where, as here, the lease is a valid one and the lessee has valid rights, it is open to him to maintain a suit for recovery of possession.

9. At this stage, I may notice one more contention taken on behalf of the appellants, namely, that the non-impleading of Govindaraju in the present proceedings is fatal to it. This objection has not been taken at any earlier stage but finds a place only in the grounds of appeal before this Court. No proper explanation was forthcoming as to why such a plea was not taken at any earlier stage. I do not think it is possible to entertain the plea at this belated stage.

10. There was some reference to the plaintiff being a cultivating tenant and the suit not being maintainable. I do not think that there is any substance in this plea. This is not a case where the proceeding is against the cultivating tenant in respect of rights which are safeguarded under the tenancy legislation. This is a case where the tenant, in order to exercise his right as a tenant, is seeking to recover possession from a stranger. Such a suit is not barred by any provision of tenancy legislation.

11. In the result, I am satisfied that Govindaraju Chettiar had a life-interest in the properties, that his right to management could be exercised even when he was away and that he can exercise those rights through his power-of-attorney agents if he happened to be away from his village. The suit itself is maintainable as a lessee can seek to recover possession of the properties of which he is entitled to be in possession. Thus there is no impediment either to the maintainability of the suit or to the grant of prayer as has been done by the Courts below.

I see no reason to interfere. Hence this second appeal is dismissed with costs. No leave.

R. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

A. Velumani .. *Petitioner**

v.

Angappa Mudaliar .. *Respondent.*

(A) *Provincial Insolvency Act (V of 1920), section 75 (1)—Transferee from debtor—Debtor adjudicated insolvent on creditors petition—Appeal by transferee —If maintainable.*

(B) *"Person Aggrieved"—Meaning of*

The interest of one creditor has no impact on the interest of another creditor in so far as insolvency is concerned. Their interests are distinct and separate. Any person who makes an application to the Court for decision or any person who is brought before the Court to submit to a decision, is, if the decision goes against him, thereby a "person aggrieved" by the decision. [*Paras.* 3 *and* 4.]

Held that the transferee from the insolvent Could maintain the appeal. [*Para.* 4.]

Cases referred to:—

Official Trustee of Madras v. *Sethu Chettiar* (1948) 2 M.L.J. 194 : I.L.R. (1949) Mad. 323 : A.I.R. 1949 Mad. 131 ; *Alagappa Chettiar* v. *Vellachami Servai* 112 I.C. 623: A.I.R. 1928 Mad. 981 (1).

Petition under proviso to section 75 (1) of Provincial Insolvency Act praying the High Court to revise the Order of the Court of the District Judge, West Coimbatore at Coimbatore, dated 18th September, 1974 and made in C. M. A. No. 36 of 1974 (I. P. No. 70 of 1970 on the file of the II Additional Subordinate Judge of Coimbatore, dated 10th November, 1970).

B. T. Seshadri, for Petitioner.

V. Ratnam, for Respondent.

The Court made the following

ORDER.—Following the decision of the learned Judge Govindarajachari, J., in *Official Trustee of Madras* v. *Sethu Chettiar*[1], this revision petition has to be dismissed. The petitioner is a transferee from a debtor who was sought to be adjudicated insolvent by one of the creditors. The Court entertained the application of the creditor, examined him, accepted two documents filed by him and marked them as Exhibits A-1 and A-2 and thereafter said "Petition is allowed adjudging the respondent insolvent". Curiously enough the respondent therein did not file an appeal. But the respondent before me and in the lower Court in these proceedings being the transferee of the properties of the insolvent and who is really affected by the order of insolvency filed an appeal against the perfunctory order which resulted in the insolvency of his vendor. The lower Court rightly appreciated the evidence, accepted the appeal and remitted the matter for a fuller consideration by the insolvency Court. The petitioner before me (petitioning creditor) objected to the maintainability of the appeal by the transferee who is outside, *prima facie,* the proceedings initiated by him against the insolvent. He would also say that the order of insolvency was passed on merits. But these contentions were not upheld and the appeal was allowed and the matter remitted to the insolvency Court for a fuller appraisal and adjudication of the real issue. As against this the present revision petition has been filed.

2. Learned counsel for the petitioner though feebly attempted to maintain that the order of adjudication was made on merits was not able to sustain the same since the non-speaking order of the insolvency Court is neither evident nor self-explanatory. It does not appear from the record that the insolvency Court applied its mind to the material placed before it, before it pronounced the

*C.R.P. No. 3360 of 1974. *28th August,* 1975.

1. (1948) 2 M.L.J. 194: I.L.R. (1949) Mad. 323: A.I.R. 1949 Mad. 131.

order of adjudication. The learned Subordinate Judge who passed the order does not even say that he was *prima facie* of the view that by such alienations under Exhibits A-1 and A-2 the insolvent 'intended to defeat and delay the interests of his creditors'. This observation should find a place in such orders in order to avoid any misgiving at a later stage about the non-application of the mind of the insolvency Court to the facts and circumstances of the case and to the real matter under controversy. Therefore, the order of adjudication has been pronounced in such an unsatisfactory state of affairs. This cannot be disputed by the learned counsel for the petitioner.

3. The more important question is whether the transferee respondent before me is a person aggrieved within the meaning of section 75 of the Provincial Insolvency Act, which would enable him to file an appeal to the appellate authority to interfere with the aforesaid order of adjudication. The learned counsel for the petitioner relies upon the decisien in *Alagappa Chettiar* v. *Vellachami Servai*[1], in support of his contention. That is not a case which is opposite to the one under consideration by me. That was a case where an appeal was filed by one creditor against the acceptance of the claim of another creditor. Interests of creditors in an insolvency petition are distinct and separate. The interest of one creditor has no impact on the interest of another creditor in so far as the insolvency is concerned. This patent circumstance was taken into consideration by the Division Bench of our Court when it said that a co-creditor of an insolvent cannot be deemed to be an aggrieved person when another creditor's claim is accepted by the official receiver. Facts therefore are totally different and the ratio in that case is inapplicable to the present situation.

4. The relevant and the nearest case which could be cited has been referred to by the learned counsel for the respondent. An eminent Judge of our Court Govindarajachari, J., in *Official Trustee of Madras* v. *Sethu Chettiar*[2], in an elucidatory and illuminating judgment and after referring to the decision in *Alagappa Chettiar* v. *Vellachami Servai*[1], held that a person who satisfies the description of the respondent in this revision petition would be an aggrieved person within the meaning of section 75 of the Act. I am inclined to excerpt certain observations of the learned Judge instead of in any manner lessening the weightage of the observations made by him in the said judgment. After narrating in extenso the English authorities, the learned Judge accepted the view that "any person who makes an application to the Court for decision or any person who is brought before the Court to submit to a decision, is, if the decision goes against him, thereby 'a person aggrieved' by that decision." The learned Judge also said that the embarrassment which may result from the order of adjudication provides such embarrassed person with a sufficient grievance and clothes him with the necessary status to question the order of adjudication is an appeal. The involuntary involvement of the transfeere in the insolvency, makes him an affected person. While respectfully adopting the observations made above, I am of the view that the lower Court was right when it said that the transferee from the insolvent could maintain the appeal and having regard to the circumstances of the case I uphold the order of remit since the original pronouncement resulting in the adjudication of the insolvent is based on a cryptic non-speaking order. The revision petition is dismissed. There will be no order as to costs.

R. S. *Petition dismissed.*

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1. 112 I.C. 623: A.I.R. 1928 Mad. 981 (1).
2. I.L.R. (1949) Mad. 323: (1948) 2 M.L.J. 194: A.I.R. 1949 Mad. 131.

1. 112 I.C. 623: A.I.R. 1928 Mad. 981 (1).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

K. Nasir Basha and another .. *Appellants**

v.

Turukkan Chatram Charities represented by its hereditary trustee Mohammed Murtuza Hussain S/o. Mohammed Habibullah Sahib R/a. No. 123/4 Mowbrays Road, Royapettah, Madras-14. .. *Respondent.*

Transfer of Property Act (IV of 1882), section 106—Monthly tenancy—Lease deed specifying thirty days notice for vacating—Notice issued accordingly—Validity.

Notice to quit is only one of the modes in which a tenancy could be determined. Section 106 of the Transfer of Property Act, only recognises two kinds of tenancies, (*i*) yearly tenancy and (*ii*) monthly tenancy. There are cases which do not come within the ambit of section 106 and they are governed, by the terms of the contract of tenancy. It is only in cases where there is no contract as to notice that the provisions of section 106 would be applicable, but where there is a contract as to giving notice or waiving notice the parties are governed by the terms of the contract and the law enacted in section 106, cannot apply. Where the contract was that the tenant should surrender the property whenever required, the provisions as to notice in section 106 cannot apply to it. The notice to quit in the instant case was valid.

[*Para*. 22.]

Cases referred to :

Dixon v. *Bradford and District Railway Servants' Coal Supply. Society*, (1904) 1 K.B. 444 ; *Beevi Umma* v. *Alloth Shamu Menon*, (1916) 3 L.W. 189 : 32 I.C. 709 ; *Chunilal* v. *Chuni Lal*, A.I.R. 1923 Lah. 659. *Baidyanath* v. *Onkarmal*, A.I.R. 1938 Cal. 656; *U. A. Manfg. Company* v. *Motilal Bombay Mills*, A.I.R. 1943 Bom. 306; *Mukanchand* v. *Gulabchand*, A.I.R. 1950 Ajmer 79; *Doe D. Lucy Mary King* v. *Grafton*, 88 Revised Reports 678 ; *Arunachala Naicker* v. *Ghulam Mahmood Saheb*, (1950) 2 M.L.J. 535: 63 L.W. 940 : A.I.R. 1951 Mad. 408 ; *Kelu* v. *Namad Kuti*, (1910) M.W.N. 794 : 8 I.C. 362 ; *Moosa Kutty* v. *Thekke* 100 I.C. 398 : A.I.R. 1928 Mad. 687 ; *Madhava Rao* v. *Bhagwandas*, A.I.R. 1961 M. P. 138; *C. E. Treasurer* v. *S. F. B. Tyabji*, A.I.R. 1948 Bom. 349.

*S.A.No. 11 of 1975. *25th July*, 1975.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in Appeal Suit No. 116 of 1973 preferred against the decree of the Court of the District Munsif of Poonamallee in Original Suit No. 349 of 1968.

M. Srinivasan, for Appellants.

T. V. Subramaniam and *Naziruddin*, for Respondent.

The Court delivered the following

JUDGMENT.—Defendants are the appellants.

2. The suit was for ejectment on the allegations that the plaintiffs trust is the owner of the suit property, that the first defendant is a monthly tenant under the plaintiff, that the first defendant, according to the lease, should vacate after thirty days' notice, that no improvement had been made by the defendants as to claim compensation at the time of vacating, that to the notice issued the first defendant replied denying the tenancy, that thereupon a fresh notice dated 26th January, 1968 was issued determining the tenancy and that the second defendant has been impleaded as a party, as the first defendant has transferred the lease to him. The plaintiff no doubt denied the alleged transfer and also denied any practice in respect of chatram properties, alleged by the defendants.

3. The first defendant contended that he transferred the lease to the second defendant on 21st November, 1967 which has been recognised by the plaintiff, that compensation has to be paid for the improvement made and that the lease is a permanent one and cannot be terminated, particularly against the wish of the creator of the trust who wanted to benefit his relations. The first defendant also con-

tended that the notice to quit is defective and that he is an unnecessary party since the second defendant alone is the tenant, whose tenancy has not been terminated. It has also been alleged by the first defendant that the suit property is a minor inam, that the defendants are entitled to patta, and that the matter should be referred to the Settlement-Tahsildar. Finally, the first defendant pleaded that the suit is bad for misjoinder of causes of action.

4. The second defendant, in his written statement, alleged that he is the tenant, that no valid notice of termination has been given to him, and that as he got a transfer of the lease by paying Rs. 3,000 the said amount should be paid to him by the plaintiff. In other respects, the second defendant adopted the written statement filed by the first defendant.

5. The trial Court, on the issues framed, held that the lease deed Exhibit A-1 executed by the first defendant clearly mentions that the lease can be terminated by thirty days' notice, that the lease is not a permanent one, that Exhibit B-12, the lease deed in favour of the second defendant, is a fabricated one and as such it is only the first defendant who is the lessee under the plaintiff and not the second defendant, and that Exhibit A-2, the notice determining the tenancy of the first defendant giving him thirty days' notice as per the terms of the lease, is valid and enforceable in law. The trial Court further held that no compensation need be paid to the defendants for the alleged improvements and there is no question of misjoinder of parties and causes of action, as pleaded by the defendants. On these findings, the trial Court directed the defendants to hand over vacant possession of the suit property within a month from 23rd October, 1972.

6. Aggrieved by the said decision of the trial Court, the defendants preferred an appeal to the Sub-Court, Chingleput. The Subordinate Judge of Chingleput confirmed the findings of the trial Court and dismissed the appeal, A. S. No. 116 of 1973.

7. Aggrieved by the decisions of the Courts below, the defendants have now preferred this second appeal.

8. The main points argued by Thiru Srinivasan, the learned counsel appearing for the appellants are :—

(*i*) That the lower appellate Court has not discussed the evidence on record as the final Court of facts, and as such the decision given by the lower appellate Court has to be set aside.

(*ii*) That Exhibit A-2, the notice to suit, is not valid in law.

(*iii*) And that the suit is bad for misjoinder of causes of section.

9. Thiru T. V. Subramaniam, the learned counsel appearing for the plaintiff-respondent contended that the evidence is before this Court, and the discussion made by the trial Court is also there in its judgment and as such this Court can decide the matter without any difficulty, that section 106 of the Transfer of Property Act cannot be strictly enforced in view of the agreement Exhibit A-1 and that as such the notice Exhibit A-2 is valid in law. The learned counsel also submitted that there is no question of any misjoinder of causes of action or parties to warrant a dismissal of the suit.

10. Exhibit A-1 is the lease deed. It is mentioned in the lease deed that the first defendant should vacate the property whenever needed by the plaintiff on the plaintiff giving thirty days' notice to the first defendant. Thus, Exhibit A-1 is a clear contract specifying the time to be given to the first defendant for vacating the property. Exhibit A-2 is the notice to quit given to the first defendant. In the said notice, reference has been made to the lease agreement dated 7th November, 1967 (Exhibit A-1). It determined the tenancy of the first defendant by the end of thirty days after the receipt thereof. Exhibit A-2 also called upon the first defendant to quit and deliver vacant possession of the property after the expiration of the abovesaid period.

Section 106 of the Transfer of Property Act states :—

> " In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural

or manufacturing purposes shall be deemed to be a lease from year to year........; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either the lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy."

11. Thiru Srinivasan, the learned counsel appearing for the appellants, submitted that under Exhibit A-2, no doubt, thirty days' notice has been stipulated instead of fifteen days as contemplated under section 106, Transfer of Property Act, but that section 106 further stipulates that such a notice must expire with the end of a month of the tenancy. It is thus argued that the notice Exhibit A-2, terminating the tenancy by the end of thirty days of the receipt of Exhibit A-2 is defective since it does not determine the tenancy with the end of a month of the tenancy. For this proposition, Thiru Srinivasan cited a number of decisions.

12. In *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society*[1], the King's Bench Division, interpreting an agreement which mentioned "I beg to give you three months' notice that we shall cease the tenancy", came to the conclusion that in that case there was an oral tenancy and that the three months to quit must expire with the year of tenancy. It further held that the tenancy had not been duly determined.

13. The next decision cited is *Beevi Umma* v. *Allath Shamu Menon*[2]. In that case there was an agreement to deliver possession on demand. Dealing with the said provision, a Bench of this Court held that the provision for delivery of possession on demand did not constitute a contract to the contrary within the meaning of section 106 of the Transfer of Property Act, as it did not mention the time at which the demand should be made and that the provision for the payment of rent annually could not be split up.

1. (1904) 1 K.B. 444.
2. (1916) 3 L.W. 189: 32 I.C. 709.

14. *Chuni Lal* v. *Chuni Lal*[1], lays down the principle as stated in *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society*[2].

15. In *Baidyanath* v. *Onkarmul*[3], which dealt with a specific agreement pertaining to tenancy in that case, it was held that the only way by which either party could determine the tenancy was by observing the provisions of section 106 and that in that case the lease was not terminated by the notice.

16. The next case cited is *U.A. Manfg. Co.* v. *Motilal Bombay Mills*[4], wherein a Bench of the Bombay High Court has held that a provision in an agreement of tenancy to the effect that either side will give one clear month's notice to determine the tenancy does not affect the rule that the notice must expire with the expiration of the tenancy. Thus, this decision also follows the decision in *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society*[2].

17. To the same effect is the decision in *Mukanchand* v. *Gulabchand*[5], wherein the Ajmer Chief Court held:—

> "Though the special contract as to notice abrogated the first rule in section 106 regarding 15 days' notice still the notice had to comply with the second rule in that section and was invalid as it did not expire on the last date of a month of the tenancy."

18. Thiru T. V. Subramaniam, to support his contention that the notice given under Exhibit A-2, need not conform to the requirements of section 106 in view of Exhibit A-1, cited a number of decisions. The first decision cited by him is *Doe D. Lucy Mary King* v. *Grafton*[6]. In that decision, dealing with the agreement entered into between the parties in that particular case, it was held that the tenancy cannot be construed as a yearly tenancy and the six months'

1. A.I.R. 1923 Lah. 659.
2. (1904) 1 K.B. 444.
3. A.I.R. 1938 Cal. 656.
4. A.I.R. 1943 Bom. 306.
5. A.I.R. 1950 Ajmer 79.
6. 88 Rev. Rep. 678.

notice to quit mentioned in the agreement need not end with the year of tenancy. As such the Queens Bench held that the notice to quit was a valid one.

19. The next case cited by Thiru T. V. Subramaniam is *Arunachala Naicker* v. *Ghulam Mahmood Saheb*[1]. In that decision, a Bench of this Court, interpreting the contract entered between the parties for determining the tenancy stated :—

> "It seems to us that when there is a contract governing the question of notice we must read that contract in a reasonable way to ascertain what the parties intended by way of notice and not try to read into the contract some term that would have to be implied only if there were no contract. It seems to us reasonable to conclude from the passage set out in the opening paragraph that not merely did the parties intend that the period of notice should be one month, but also that the one month's notice should be given at any time."

The relevant portion of the contract which was the subject-matter of interpretation in the above decision read as follows:—

> "Besides this, if you, after the said stipulated period, send me a notice giving one month's time I shall vacate the said land and deliver to you possession thereof."

Thus, it is clear that the terms of the contract considered in the above said Bench decision are analogous to the contract under Exhibit A-1 in the case before us.

20. At this stage, Thiru Srinivasan confronted the other side with the Bench decision in *Beevi Umma* v. *Allath Shamu Menon*[2], wherein it has been stated that the notice must end the tenancy with the month of tenancy. But in *Beevi Umma* v. *Allath Shamu Menon*[2], the words which came up for discussion were 'on demand'. In those circumstances, the Court held that the demand must be in conformity with section 106 of the Transfer of Property Act. I do not find any conflict of ruling in the above two decisions.

21. Thiru T. V. Subramaniam also cited the decision in *Kelu* v. *Namad Kutti*[1], There, a Bench of this Court held that where the lease deed contained an express stipulation to surrender on demand, there is a contract to the contrary within the meaning of section 106, Transfer of Property Act and that no notice to quit is necessary.

22. In *Moosa Kutty* v. *Thekke*[2], also, a Bench of this Court held that if according to the terms of the lease the tenant is not entitled to notice, it cannot be said that the cause of action does not arise till the period given in the notice to quit expires. Notice to quit is only one of the modes in which a tenancy could be determined. Section 106 only recognizes two kinds of tenancies, one yearly tenancy and the other monthly tenancy. There are cases which do not come within the ambit of section 106 and they are governed by the terms of the contract of tenancy. It is only in cases where there is no contract as to notice that the provisions of section 106 would be applicable; but where there is a contrct as to giving notice or waiving notice the parties are governed by the terms of the contract and the law enacted in section 106, Transfer of Property Act, cannot apply. Where the contract was that the tenant should surrender the property whenever required, the provisions as to notice in section 106 cannot apply to it.

23. In *Madhav Rao* v. *Bhagwandas*[3], the Madhya Pradesh High Court held :—

> "When there is an agreement as to the period of notice, it is a contract to the contrary for all purposes of section 106. The second provision enquiring the notice to expire with the end of tenancy month is non-concomitant part of the requirement and forms an indivisible condition."

Thiru T. V. Subramaniam also cited the decision in *C. E., Treasurer* v. *S. F. B*

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1. (1950) 2 M.L.J. 535: 63 L.W. 940: A.I.R 1951 Mad. 408.
2. (1916) 3 L.W. 189: 32 I.C. 709.

1. (1910) M.W.N. 794 : 8 I.C. 362.
2. 100 I.C. 398: A.I.R. 1928 Mad. 687.
3. A.I.R. 1961 M.P. 138.

Tyabji[1], wherein a Bench of the Bombay Court categorically held that in the case of a lease, the privity of contract is between the lessor and the lessee, and not the lessor and the assignee from the lessee, and as such, there is no need to give notice either as per section 106 or according to the agreement, to the assignee of the lessee.

24. From the above discussion it is clear that, as has been held in *Arunachala Naicker* v. *Ghulam Mahmood Saheb*[2], that if there is a contract, the intention of the parties has to be ascertained in applying section 106, Transfer of Property Act. As far as the present case is concerned, Exhibit A-1 is a "contract to the contrary" in relation to the provisions of section 106. From the said contract, it is clear that the parties intended that the period of notice should be one month and that a month's notice should be given at any time irrespective of the expiration of a month of the tenancy. In my view also, the second provision requiring the notice to expire with the end of a tenancy month is concomitant part of the requirement and forms an indivisible condition.

25. The contention of Thiru Srinivasan as to want of discussion by the lower appellate Court regarding facts, assumes little importance, inasmuch as I have discussed the necessary facts in detail in second appeal.

26. I do not also think there is any substance in the argument that the suit has to fail for misjoinder of parties and causes of action. The plaintiff has correctly given notice to the first defendant who is the lessee under him and there is no need to give notice to the assignee of the lessee. This apart, nobody, is prejudiced by adding the assignee who claims that he is in possession by virtue of the assignment made by the lessee.

27. In these circumstances, the second appeal is dismissed. No costs. No leave.

R.S. —— *Appeal disimissed.*

1. A.I.R. 1948 Bom. 349.
2. (1950) 2 M.L.J. 535: A.I.R. 1951 Mad. 408.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Sivabaghathammal and others .. *Appellants**

v.

Thangappa Nadar .. *Respondent.*

Promissory Note—Insufficiently stamped—Hand loan in morning—Execution of stamped receipt in evening—Suit on original debt—Whether maintainable.

Whether a suit lies on the debt apart from the instrument depends on the circumstances under which the instrument was executed. If really the instrument is only evidence of the lending, the suit will lie. In a loan transaction, the principal contract itself consists of the promise to repay. [*Para.* 4.]

In the circumstances of the case, the receipt was only evidence of the lending and the suit was maintainable. [*Para.* 4.]

Case referred to :—

Perumal v. *Kamakshi*, (1938) 2 M.L.J. 189: 48 L.W. 220: I.L.R. (1938) Mad. 933: 177 I.C. 236: A.I.R. 1938 Mad. 785.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai in Appeal Suit No.75 of 1966, preferred against the decree of the Court of the District Munsif of Devakottai in Original Suit No. 154 of 1966.

S. Ramasubramaniam, for Appellants.

S. Balasubramaniam, for Respondent.

The Court delivered the following

JUDGMENT :—The second appeal arises out of O.S. No.154 of 1966 which is a suit for recovery of Rs.4094-90. The case of the plaintiff is that on the morning of 24th April, 1964, the defendant took a hand-loan of Rs.3,500 from the plaintiff for family expenses agreeing to repay with interest at 9 per cent. per annum and on that very day in the evening he executed a

*S.A.No. 1036 of 1972. 31st July, 1975.

stamped receipt in token of having received this amount. Therefore, the suit is filed on the original debt, the receipt even if it be a promissory note, being insufficiently stamped.

2. In the written statement the defendant contended that he never executed any receipt nor did he borrow any hand-loan at all. His further case was that the plaintiff requested the defendant to sell one of his cows and thereupon it was sold for Rs.220/-, that purporting to be a receipt for the payment of the said sum of Rs.220/- the suit promissory note has been taken from him stealthily and that in any event the suit document is inadmissible in evidence as not being duly stamped and that the suit based on the original cause of action is not maintainable. The trial Court dismissed the suit holding that the suit promissory note was insufficiently stamped and further held that there was no borrowing by the defendant.

3. On appeal, the lower appellate Court upheld the borrowing but however confirmed the finding that the promissory note being insufficiently stamped it was not open to the plaintiff to recover the same and the suit will not lie on the debt since the promissory note embodied all the terms of the contract.

4. A careful reading of the plaint will clearly show that the borrowing was in the morning on 24th April, 1964 and in the evening the promissory note came to be executed. Therefore the Courts below are not right in holding that the suit cannot be maintained on the original cause of action. I say so because the very Full Bench judgment on which both the Courts below relied, *Perumal v. Kamakshi*[1], clearly lays down that whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed. If really the instrument is only an evidence of the lending, certainly the suit will lie. In this connection, I may usefully refer to the observations of the Full Bench made at page 789 :

"The question is, how far does this rule or the reason of the rule apply to cases in which a person borrowing money executes as part of the same transaction a promissory note in favour of the lender? That the terms as to rate of interest, date of payment, etc., form part of the contract and cannot be proved except by proof of the notice seems to be more or less admitted."

Again, at page 793 it is said :

"In the case of a loan transaction, the principal contract itself consists of the promise to repay and it cannot be said that the implied promise on which the action for money had and received depends forms no part of but is merely collateral to the main contract".

Therefore, the finding of both the Courts that the suit is not maintainable, is incorrect and is liable to be set aside. Inasmuch as the lower appellate Court has held that the borrowing is true, the suit will have to be necessarily decreed. Consequently the plaintiff succeeds and he will be entitled to a decree as prayed for. But the parties will bear their respective costs throughout. No leave.

R.S. —— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *T. Ramaprasada Rao, J.*

Angammal .. *Petitioner**

v.

Muthupechiammal Meenal .. *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint—When can be allowed.

Invocation of Order, 6 rule 17, Code of Civil Procedure, is possible only when the substance of the relief asked for in the original pleading is maintained, though in a different form it is sought to be corrected as to suit the convenience of the litigant. But when the amendment sought for by the plaintiff would alter

1. (1938) 2 M.L.J. 189 : 48 L.W. 220 : I.L.R. (1938) Mad. 933 : 177 I.C. 236 : A.I.R. 1938 Mad. 785.

* C.R.P. No. 3779 of 1974. 31st July, 1975.

the very foundation of the claim and the said amendment *prima facie* is distinct, separate and independent of the original relief asked for, then it would not come within the purview of amendment of pleadings at all. On the other hand it would be a substitution of a relief which is different and not asked for in the original plaint. Where, under the guise of an amendment, a distinct and separate prayer is sought to be introduced in the pleading it would not be amendment at all, but it would be the setting up of a new cause, not thought of and not even pleaded by the person concerned. When a plaint is sought to be amended and when the relief sought for, appears, on the face of it, to be an after-thought and totally disjunct from the prayer in the original plaint, then, such an application for amendment of plaint ought not to be countenanced at all.

[*Paras*. 1 *and* 2.]

Case referred to:

Palanisami Naicker v. *Chinnaswami Naicker*, (1968) 81 L.W. 95.

Petition under section 115, Civil Procedure Code praying the High Court to revise the Order of the Court of the District Munsif, Ramanathapuram dated 30th September, 1974 and made in I.A. No. 346 of 1974 in O.S. No. 355 of 1973.

N. Sivamani, for Petitioner.

K. Yamunan, for Respondents.

The Court made the following

ORDER.— It is now well settled that the invocation of Order 6, rule 17, Code of Civil Procedure is possible only when the substance of the relief asked for in the original pleading is maintained, though in a different form it is sought to be corrected so as to suit the convenience of the litigant. In a case, however, when the amendment sought for by the plaintiff would alter the very foundation of the claim and the said amendment *prima facie* is distinct, separate and independent of the original relief asked for, then it would not come within the purview of amendment of pleading at all. On the other hand, it would be a substitution of a relief which is different and not asked for in the original plaint. In the instant case, the respondents as the plaintiffs came forward with an application under Order 6, rule 17, Code of Civil Procedure under the following circumstances. In the plaint as originally filed the plaintiffs sought for a declaration that they were entitled to an easementary right over a particular portion of the suit house to a particular length. Later, they sought for an amendment by stating that no proper instructions were given to the advocate at the time when the original plaint was drafted and they wanted the relief of mandatory injunction directing the defendant to remove a wall on that portion of the property referred to in the original plaint and for a declaration that they are the owners of the pathway on the suit site. The Court below thought that in order to avoid multiplicity of proceedings the amendment sought for by the plaintiffs could be allowed under Order 6, rule 17 Code of Civil Procedure. It is as against this, the defendant has come up to this Court.

2. I have already referred to the basis on which the amendment of pleadings is allowed under Order 6, rule 17, Code of Civil Procedure. So long as the distinctiveness and the force of the original relief asked for in the earlier pleading is maintained and an attempt is made only to make an inread into the form of the relief asked for, it is permissible to allow an amendment of such pleading, but in cases where, under the guise of an amendment, a distinct and separate prayer is sought to be introduced in the pleading, it would not be an amendment at all, but it would be the setting up of a new case, not thought of and not even pleaded by the person concerned. The instant case is one in which the plaintiffs are seeking for a totally different relief. Mr. Yamunan however would say that in order to avoid multiplicity of proceedings and as no prejudice will be caused to the petitioner before me, the amendment could be allowed. These are not normal tests deployed for considering whether an application for amendment of a pleading has to be allowed. Particularly when a plaint is sought to be amended and when the relief sought for, appears, on the face of it, to be an afterthought and totally disjunct from the prayer in the original plaint, then such an application for amendment ought not to be countenanced at all. The case cited

by Mr. Yamunan, *Palaniswami Naicker* v. *Chinnaswami Naicker*[1], is one where the plaintiff even in the original plaint sought for alternative reliefs and at the appropriate time elected to rest his relief on one of such alternative pleas. The Court said that the plaintiff could adopt such an attitude, provided in the pleadings such inconsistent pleas were raised. That is not, however, the case here. The plaintiffs are seeking for a relief not connected with the original prayer at all. They sought for an easement of necessity and a consequential declaration therefor, whereas in the amendment they seek for a declaration that they are the owners of the property and for a consequential relief of mandatory injunction to demolish the wall on the disputed pathway. They are not reliefs which have any semblance,one with the other.

3. In these circumstances, the lower Court exceeded its jurisdiction in having allowed the amendment. The order is, therefore, set aside and the civil revision petition is allowed. There will be no order as to costs.

R.S. ——— *Petition allowed.*

1. (1968) 81 L.W. 95.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

N. Ram Mohan .. *Petitioner**

v.

J. Kasthuri .. *Respondent.*

(A) *Civil Procedure Code* (*V of* 1908) *section* 24—*Scope and applicability—Pauper—Original petition for partition and separate possession—Half share in the suit properties claimed—Petition filed in City Civil Court—Death of respondent pending the petition—Application by the petitioner, claiming threefourth share—Respondent mother of petitioner—Value of three-fourth share admittedly mere that Rs.* 50,000—*City Civil Court has no jurisdiction to try suit.*

(B) *Civil Procedure Code* (*V of* 1908), *section* 24 (1) (b)(2)—*Transfer of the original petition in the City Civil Court to the original side of High Court—High Court's power to order transfer pauper suit also.*

The High Court sitting for admission work is competent to transfer any suit or proceedings pending before any Court subordinate to it. The question of disposal may be by the Original Side of the High Court. It is only the High Court that has the power to transfer and there is no question of transferring that to the Original Side specifically but to the High Court in general. As soon as it is transferred to the High Court the case will be posted automatically before the Judge sitting on the original side. [*Para.* 5.]

The High Court has ample powers to transfer a pauper suit under section 24, Civil Procedure Code. The question of procedural difficulties will not arise in cases of transfer made under section 24. Even if it is so, these difficulties can be cured in the larger interests of justice and equity. The High Court of judicature on its Original Side alone has jurisdiction to try the matter in which the value is over and above Rs. 50,000. [*Para.* 7.]

*T.C.M. P. No. 9378 of 1975. *26th September,* 1975.

Cases referred to :

Srirangam Municipality v. *R. V. Palaniswami Pillai*, (1951) 1 M.L.J. 281 : I.L.R. (1951) Mad. 897 : 64 L.W. 327 : A.I.R. 1951 Mad. 807; *Mallampati Kondayya* v. *The Official Receiver, Nellore*, (1951) 1 M.L.J. 97 : I.L.R. (1951) Mad. 763 : 64 L.W. 139 : A.I.R. 1951 Mad. 676.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to direct emergently the transfer of the pauper suit numbered as O.P. No. 254 of 1974 together with all the pending applications on the file of the X Asst. City Civil Judge, Madras to the Original Side of this Court for trial and disposal according to law.

R. Dheenadhayalu, for Petitioner.

D. K. Srinivasagopalan, for Respondent.

The Court made the following

ORDER :—This is a petition to transfer the pauper suit numbered as O. P. No. 254 of 1974 together with all the pending applications on the file of the X Assistant City Civil Judge, Madras to the Original Side of this Honble Court for trial and disposal according to law. For the purpose of this transfer suffice it to state that the petitioner herein has filed the Original Petition for partition and separate possession of his ⅛ share in the suit properties before the X Assistant City Civil Judge, Madras. Subsequent to the filing of the pauper suit for partition, the respondent in that Original Petition, who is no other than the mother of the petitioner herein, died. Hence the petitioner herein has filed an application stating that after the death of his mother, who was the respondent in that Original Petition, he is, entitled to get a share of ⅜ in the suit properties instead of ⅛ share and the value of such ⅜ share is admittedly, more than Rs. 50,000. This amendment sought for by the petitioner herein has been allowed by consent of the respondent herein. Thus it is clear that the X Assistant City Civil Judge, Madras will not have jurisdiction to try the suit inasmuch as the value is over Rs. 50,000. It is only the High Court of Judicature at Madras which can try this Original Suit.

2. The petitioner herein, in view of the fact that so many applications are pending before the X Assistant City Civil Judge, Madras and also in view of the fact that the interests of justice will be well protected if a transfer is made instead of withdrawing the suit from the City Civil Court and presenting it on the Original Side of this Court, wants to transfer the suit under section 24, Civil Procedure Code. This petition is opposed by the resondent herein. Mr. D.K. Srinivasagopalan, learned counsel for the respondent, submitted that this Court sitting on the Appellate Side has no jurisdiction to transfer the Original Petition to the Original Side of this High Court. Learned counsel also submitted that section 24 (1) (*b*) (i) of Civil Procedure Code will not apply to the facts of this case. Learned counsel further submitted that there are certain procedures for filing pauper petitions before the Original Side of this Court and that by transfer all those formalities will have to be dispensed with. Hence learned counsel suggested that the plaint may be returned by the City Civil Court as provided under Order 7, rule 10 (1), Civil Procedure Code and the petitioner can as well present it before this Court.

3. Mr. Deenadayal, the learned counsel for the petitioner submits that this Court has ample jurisdiction under section 24 (1) (*b*) (i) Civil Procedure Code, to transfer the Original Petition to the Original Side of this Court. This position has been amply made clear by the decision in *Srirangam Municipality* v. *R. V. Palaniswami Pillai*[1]. Learned counsel also submits that in the interests of justice and also to maintain the *status quo* as on date, there is no point in invoking the provisions under Order 7, rule 10 (1) Civil Procedure Code but the parties' interest will be amply served if a transfer is directed under section 24 (1) (*b*) (i) Civil Procedure Code. Learned counsel next contended that the procedure in presenting the pauper appeals is meant for the presentation of pauper suits for the first time, before the High Court. The transfer of a pauper suit can always be ordered

1. I.L.R. (1951) Mad. 897: 64 L.W. 327: (1951) 1 M.L.J. 281 at 283: A.I.R. 1951 Mad. 807.

since the same is done under section 24, Civil Procedure Code and the procedure menioned in the Original Side Rules for filing the pauper suits will not come into play for transfers under section 24, Civil Procedure Code.

4. I have been taken through the decision in *Srirangam Municipality* v. *R. V. Palaniswami Pillai*[1]. In that decision a Bench of this Court has categorically held that:

> "According to us, the correct position is that an application under section 24, Civil Procedure Code should be made to this Court as such in the same manner as it might be made to the District Court and such an application can be validly heard and disposed of by any Judge of this Court deputed by the Chief Justice to hear such applications. We find actually in the Appellate Side Rules that an application under section 24 for transfer of any suit, appeal or other proceedings or in execution of a decree from one civil Court, subordinate to the High Court to another such Court or to the High Court can be disposed of by a single Judge. As a matter of practice, it is the learned Judge sitting in the Admission Court who deals with these applications. The decision further states that.. it is equally true to say that the section *viz.*, section 24, does not indicate that the High Court should exercise the power on its Original Side. ..It is one thing to say that when the application for transfer is granted and the suit itself is withdrawn to the file of this Court, then it should be tried on the Original Side of the High Court; but it is quite a different thing to say that the application for such a transfer should be made to the Original Side of this Court."

5. Thus it is clear from the observations made in the decision in *Srirangam Municipality* v. *R. V. Palaniswami Pillai*[1], that the Court sitting for admission work is competent to transfer any suit or proceedings pending before any Court subordinate to it. The question of disposal may be by the Original Side of this High Court. It is only the High Court that has the power to transfer and there is no question of transferring that to the Original Side specifically but to the High Court in general. As soon as it transferred to the High Court the case will be posted automatically before the Judge sitting on the Original Side. Hence section 24 (1) (*b*) (2) of Civil Procedure Code has no application to the facts of this case.

6. Mr. D. K. Srinivasagopalan, referred to another decision in *Mallampati Kondayya* v. *The Official Receiver, Nellore*[1], and argued that the High Court has no power under section 24 (*b*) of the Civil Procedure Code to transfer an Insolvency Petition pending before a Subordinate Court to the file of the Original Side of this Court. On an analogy, learned counsel wants to state that this Bench decision can be taken to prohibit even transfer of pauper suits pending before a subordinate Court. It has been made clear in this decision that the High Court has no power at all, to transfer that Insolvency Petition when there is no jurisdiction for the High Court to try an insolvency proceeding As for the facts of that case it is clear that the Court has held that a transfer cannot be made under section 24, Civil Procedure Code. But as far as the present case is concerned, the High Court has jurisdiction to try a pauper suit and I do not think that the decision in *Mallampati Kondaya* v. *The Official Receiver, Nellore*[1]. will be of any use to the learned counsel for the respondent herein.

7. The High Court has ample powers under section 24 to transfer a pauper suit also. The question of procedural difficulties will not arise in cases of transfer made under section 24, Civil Procedure Code. Even if it is so, those difficulties can be cured in the larger interests of justice and equity. The present case is fit case for transfer in as much as the respondent herself has admitted that the pauper petition filed before the Court below has to be amended enlarging the value of the suit. If that be so, admittedly, the High Court of Judicature

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1. I.L.R. (1951) Mad. 897 : (1951) 1 M.L.J. 281 at 283 : 64 L.W. 327 : A.I.R. 1951 Mad. 807.

1. I.L.R. (1951) Mad. 763 : 64 L.W. 139 : (1951) 1 M.L.J. 97 : A.I.R. 1951 Mad. 676.

in its Original Side alone has jurisdiction to try the matter in which the value is over and above Rs. 50,000. Taking all these aspects into consideration, I think in the interests of justice and also to avoid unnecessary complications and difficulties to the petitioner herein, by asking him to withdraw the suit and present it to the High Court, O. P. No. 254 of 1974 together with all pending applications on the file of the X Assistant City Civil Judge, Madras will stand transferred to the file of this Court to be tried by the Original Side of this High Court. There will be no order as to costs.

R.S. ——— *Transfer petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

K. Sakkanna Pillai and others .. *Petitioners**

v.

K. Pasupathi and others .. *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling of Land) Act (LVIII of 1961), section 60—Cultivating tenants —Jointly taking land on lease—Whether form an association of persons — Whether individual holding of a member of association of persons should be considered for determining ceiling limit.

Three cultivating tenants took under a joint lease an extent of 11.51 acres of land belonging to the landlord. One of the cultivating tenants was also the owner of 2.05 acres of land which he was cultivating himself. The landlord filed an application under section 62 of Act (LVIII of 1961) requesting the Authorised Officer to act under section 60 of the Act, treating the tenants as an association of persons. Both the Authorised Officer and the Land Tribunal agreed with the landlord that the tenants had to be treated as an association of persons. The Authorised Officer also took the view that the extent of 2.05 acres owned by one of the tenants would have to be taken into account for fixing the ceiling limit. On appeal by the tenants, the Court held that the tenants had to be treated as an association of persons, but that the extent of 2.05 acres owned by one of them cannot be considered in determining the ceiling limit The tenants filed a revision petition against the order of the Appellate Authority treating them as an association of persons. The landlord filed a revision petition against the exclusion of the 2.05 acroes in determining the ceiling limit.

Held, An association of individuals has always been interpreted with resference to the facts of each case with particular reference to the object with which the association was undertaken by the individuals. Viewing from any angle the three tenants should for all purposes be considered as an association of individuals within the meaning of section 3 (34) of the Land Ceiling Act. [*Para.* 2.]

If any member of the association of individuals has land of his own which does not belong to the association of individuals then such an extent owned by that person cannot enter into computation for purposes of finding out the excess of cultivating tenants, ceiling area. The addition of 2.05 acres to 11.51 acres as if the former is also a holding of the association of individuals is certainly a mistaken calculation.

[*Paras.* 4 *and* 5]

Cases referred to :—

Income-tax Commissioner v. *Smt. Indira*, (1960) 3 S.C.R. 513: 39 I.T.R. 546: (1961) 1 S.C.J. 153 : A.I.R. 1960 S.C. 1172; *Bashyam* v. *State of Madras*, (1970) 1 M.L.J. 510 ; *Subbiah Padayachi* v. *State of Madras*, (1971) 2 M.L.J. 324 : 84 L.W. 342 : A.I.R. 1971 Mad. 417.

Petitions under section 83 of Tamil Nadu Land Reforms Act, 1961 praying the High Court to revise the decree of the Court of the Land Tribunal (Subordinate Judge), Thanjavur dated 25th August, 1972 and made in C.M.A. No.456 of 1971 modifying the order dated 2nd September, 1971 and

*C.R.P. Nos. 1157 of 1973 and 952 of 1974. *29th July*, 1975.

made in M. R. II- 63—P/K. B K/ J. on the file of the Court of the Authorised Officer (Land Reforms), Thanjavur.

V. Radhakrishnan, for Petitioner in C.R.P. No.1157 of 1973 and for 1st Respondent in C. R. P. No. 952 of 1974.

V. Sivanathan for *S. Somasundaram*, for Respondents 1to3 in C.R.P. No. 1157 of 1973 and for the Petitioners in C.R.P. No. 952 of 1974.

The Court made the following

ORDER.—These two revision petitions are connected. In C. R. P. No. 952 of 1974, the three petitioners are the cultivating tenants. In C. R. P. No. 1157 of 1973 the petitioner is the landlord. The landlord filed an application under section 62 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Act LVIII of 1961) requesting the Authorised Officer to take possession of the land in the possession of the cultivating tenants which is in excess of the cultivating tenants ceiling area as fixed under section 60 of the Act. It is common ground that under a joint lease dated 28th May, 1969 Exhibit R-1, the three tenants jointly obtained a lease of an extent of 11.51 acres of land belonging to the landlord. It is also common ground that one amongst the petitioners besides being a joint lessee as above, was also the owner of 2.05 acres of land and was also cultivating the same by himself. When the application for resumption, if such an expression could be used, was filed by the landlord under section 62 of the Act, the main contention of the tenants was that they had a distinct and decipherable interest in the demised land and there was no jointness in the lease, as they were enjoying the leased land independently and separately. On the other hand, the landlord's case was that on the bare recitals of Exhibit R. 1 and on a fair interpretation thereof, it is seen that what was demised was jointly demised conjointly to the three petitioners as such, and, therefore the tenants should be considered as a person within the meaning of section 3 (34) of the Act and as an association of individuals and thus considered, the cultivating tenants ceiling area has to be fixed with reference to section 60 of the Act. Unmindful of the internal arrangements as between the tenants in the matter of the separate and distinct enjoyment of the demised land, both the Authorised Officer (Land Reforms) Thanjavur and the Land Tribunal, Subordinate Judge, Thanjavur, agreed with the contention of the landlord that the tenants in question have to be treated as an association of individuals and dealt with as such. On a further consideration of the merits, the Authorised Officer was of the view that the independent holding of one of the tenants namely 2.05 acres, also has to be added on to the extent of the holding of the association of persons and thereafter the ceiling limit of the aforesaid, 'person' has to be ascertained. On this view, the Authorised Officer held that 2.05 acres owned by one of the tenants has to be added on to the demised land of an extent of 11.51 acres and out of the total extent of 13.56 acres after taking the prescribed statutory limit of 5 standard acres as defined in section 60 of the Act, held that he was entitled to take possession of 8.56 acres as if it was an excess with the association of persons, as cultivating tenants. On appeal the learned Subordinate Judge was of the view, as already stated, that the tenants have to be statutorily treated as an association of individuals but on the other question, whether the independent holding of one of the tenants should also be added on to the extent of the demised land, held that the extent of 2.05 acres owned by one of the tenants has to be taken out of consideration for the purpose of fixing the land in excess of the cultivating tenants' *i.e.*, (the association of individuals) ceiling area and modified the order accordingly. As against the order of the Authorised Officer as also the appellate authority in the matter of the treatment of the three tenants as an association of individuals, the tenants have come up to this Court in C.R.P. No. 952 of 1974. As against that part of the order of the learned Subordinate Judge, who excluded the independent holding of one of the tenants from consideration for the purpose of fixing the excess the landlord has come up to this Court in C.R.P.No. 1157 of 1973.

2. I heard arguments. The short point for consideration, is, whether the treatment of the three individuals, who took up 11.51 acres of land on lease under Exhibit R-1 as an association of individuals is correct or not. The argument is that the mere fact that the three persons have joined together and entered into a lease with the landlord for purposes of cultivating the land so demised would not make them as association of individuals. The proposition broadly stated may be right. But this aspect has to be not only considered with reference to the bare jural relationship created between the parties as evidenced in a regular deed therefor, but should be understood in a realistic sense with reference to the common object which motivated them to enter into such a transaction. An association of individuals has not been defined as such in any of the known laws which has adopted that parenthesis. It has always been interpreted with reference to the facts of each case with particular reference to the object with which the association was undertaken by the individuals. If there is a commencality in the enterprise and if the union or association was brought up with one object in view so as to promote a particular avocation or cause and if there is acceptable material to hold, that the association was brought up with the sole purpose of exploiting a particular cause or purpose or an object, then it has been accepted more or less as a convention that such association of individuals would be legally and terminologically called an association of persons. This expression is commonly used in tax laws and in one of the decisions considered by the Supreme Court in *Income-tax Commissioner* v. *Smt. Indira*[1] the learned Judges said:—

> "There is no formula of universal application as to what facts, how many of them and of what nature are necessary to come to a conclusion that there is an association of persons within the meaning of section 3; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not."

It is, therefore, clear that the given hypothesis in a given case has to be adjudged and the opinion expressed by Tribunals or Courts which have occasion to consider such a data, as to whether a grouping of individuals was for a common object with a common purpose and to undertake an avocation for a common gain. Viewed in the light of this generic explanation which is available for the expression 'association of individuals', it cannot be said that in the instant case the jointness of the lease obtained by the tenants from the landlord is for a purpose other than for exploitation of the land for cultivation and for their common benefit and gain. I am unable to agree with the learned counsel for the petitioner that the tenants were in distinct and separate possession of parcels of the demised land. Apart from the fact that this contention on merits was discountenanced by the Courts below, the commencality of the purpose for which the three tenants associated themselves by itself provides the key to understand the common object which prompted them to so associate themselves. Viewing from any angle the three tenants should for all purposes be considered as an association of individuals within the meaning of section 3 (34) of the Ceiling Act. According to this definition a person includes any trust, company, family, firm, society or association of individuals, whether incorporated or not or any private trust or public trust. We are concerned only with an association of individuals. While defining the cultivating tenant's ceiling area, section 60 says that cultivating tenant's ceiling area means 5 standard acres held by any person partly as cultivating tenant and partly as owner or wholly as cultivating tenant. If we, therefore, substitute the definition of a 'person' in section 3 (34) in section 60, it is clear that the cultivating tenant's ceiling area means 5 standard acres held by an association of persons partly as cultivating tenant and partly as owner or wholly as cultivating tenant. In this view, therefore, the finding of the Court below that the tenants in question ought to be dealt with as an association of persons and their ceiling limit should be fixed in that context under section 60 of the Act and any excess found over the ceiling limit should be taken possession of by the Authorised

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1. (1961) 1 S.C.J. 153: (1960) 3 S.C.R. 513: 39 I.T.R. 546: A.I.R. 1960 S.C. 1172.

Officer is correct. The opinion expressed by me finds favour with the judgment of this Court rendered by Kailasam, J., in *Bashyam* v. *State of Madras*[1]. The learned counsel for the petitioner, however, invited my attention to the definition of 'family' in section 3 (14) and would urge that the tenants in question by stretching the objective with which they united themselves be dealt with as a family and as Chapter VIII dealing with cultivating tenant's ceiling area does not refer to family as such, the tenants in question so dealt with and considered ought not to be found as cultivating tenants in possession of any land in excess of the cultivating tenant's ceiling area. Reference is made to a judgment of Ramanujam, J., in *Subbiah Padayachi* v. *State of Madras*[2], There, the question was entirely different. The learned Judge was considering the impact of section 5 (2) in juxtaposition to the ceiling area fixed in section 60. In those circumstances, the learned Judge said that legislative intention as brought out in Chapter VIII of the Ceiling Act is clear and that for purposes of Chapter VIII the notion of family cannot be brought in. He further observed:

> "Hence, the separate holdings of the members of the family, such as the minor sons of the cultivating tenant, cannot be grouped and aggregated for fixing the cultivating tenant's ceiling area under section 60."

What was being considered by Ramanujam, J., was entirely a different matter. That was not a case, where the question which arose for consideration was whether persons taking a demised land under a joint lease could be captioned as an association of individuals or otherwise. I am unable to subscribe to the view of the learned counsel for the petitioner that the tenants in the instant case should not be dealt with as association of individuals but as a family. I am doubtful whether the ratio in *Subbiah Padayachi* v. *State of Madras*[2], can ever assist the petitioners-tenants at all.

3. For the above reasons, I hold that the tenants should be dealt with as association of individuals and C.R.P. No. 952 of 1974, is, therefore, dismissed; but there will be no order as to costs.

C.R.P. No. 1157 of 1973:

4. The next subsidiary question which arises is whether the appellate Tribunal was right in having modified the order of the Authorised Officer in having omitted an extent of 2.04 acres which admittedly belongs to one of the tenants from consideration for the purpose of ascertaining the excess over the ceiling limit. As I said, though the expression 'association of individuals' has not been jacketted within a definition under any statute, yet the meaning of the expression has, more or less by convention and by explanation, become clear and is well-understood. An association of individuals is a person within the meaning of section 3 (34) of the Act. It is an entity by itself which for the purpose of tax laws and for purposes of Acts like the one under consideration has a special treatment and a separate signification. The persons who constitute the association of individuals are different from the association of individuals itself. Looking at the text of section 60 which says that cultivating tenant's ceiling area means 5 standard acres held by any person partly as cultivating tenant and partly as owner or wholly as cultivating tenant, it has given also the clue that the person in section 60 of the Act, if it relates to an association individuals, has to be dealt with as a separate entity and for purposes of fixing the excess under section 62, the association of persons should own lands, should cultivate lands, and should be wholly or partly a cultivating tenant or owner of land. If any member of the association of individuals has land of his own which does not belong to the association of individuals, then such an extent owned by that person without reference to the association of individuals cannot enter into the computation for purposes of finding out the excess of the cultivating tenant's ceiling area. When once it is conceded that the person with whom the Tribunal or Court is concerned is an association of individuals then the person or persons, who

1. (1970) 1 M.L.J. 510.
2. (1971) 2 M.L.J. 324 : 84 L.W. 342 : A.I.R. 1971 Mad. 417.

formed that entity of association of individuals do not come into the picture for any purpose and much less for the purpose of the ascertainment of the excess of the cultivating tenants ceiling area, the cultivating tenant in that case being an association of individuals.

5. If, therefore, the realistic concept of an association of individuals is borne in mind, then the addition of 2.05 acres to 11.51 acres as if the former also is a holding of the association of individuals, is certainly a mistaken calculation. This has been rightly corrected by the Appellate Tribunal. I see no reason to interfere.

6. C.R. P. No. 1157 of 1973 is also dismissed, but there will be no order as to costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

Karuppammal and others .. *Appellants**

v.

T. U. Poosari and others .. *Respondents.*

and

Kandaswamy Gounder and others .. *Appellants*

v.

T. U. Poosari and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 9 —*Suit to set aside decree in another suit—Suit decreed—Appeal—Jurisdiction—Meaning of—Court cannot decide matters not in dispute before it—Court acted wholly without jurisdiction.*

In a suit for partition, the share of a particular person being conceded there was no controversy at all about it. The Court, however, went on to decide even in respect of such share holding that that person was not entitled to any share at all. The decree in this suit was sought to be set aside by another suit on the ground that the Court had acted without jurisdiction in so deciding and the suit was decreed and the decree in the earlier suit was set aside. Some of the defendants filed appeals.

Held, however erroneous a decree might be, it cannot be set aside or treated as a nullity unless, it is shown that the same had been obtained by fraud or that the Court had no jurisdiction to pass such a decree. By jurisdiction is meant the authority which a Court has to decide matters that are litigated or it takes cognizance of matters presented in a formal way for its decision. In the present case, the Court had purported to decide a matter which was not in controversy before it and therefore it had acted wholly without jurisdiction. It is not a case merely of an erroneous exercise of jurisdiction. [*Paras.* 27 *and* 29.]

Cases referred to :—

Raj Want Prasad Pande v. *Mahant Ram Ratan Gir*, 42 I.A. 171 : 29 M.L.J. 165 : 2 L.W. 671 : 30 I.C. 849; *H. Nath Roy* v. *R. C. Varna Sarma*, A.I.R. 1921 Cal. 34 (F.B.): *Navaneethammal* v. *Ammakannammal*, (1944) 2 M.L.J. 67 : 218 I.C. 58 : I.L.R. (1945) Mad. 216: A.I.R. 1944 Mad. 513; *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, I.L.R. 41 Cal. 493 (P.C.): 40 I.A. 223: 26 M.L.J. 25 : 21 I.C. 750.

Appeals against the decree of the Subordinate Judge, Coimbatore and passed in O. S. No. 99 of 1963 and dated 23rd January, 1969.

R. Rajagopala Iyer and *N. Balasubramania Iyer*, *P. Pandi*, for Appellants.

M. S. Venkatarama Iyer, *S. Sankaran*, *S. Thyagaraja Iyer* and *N. Vanchinathan*, for Respondents.

The Court delivered the following

JUDGMENT.—These two appeals arise out of a suit to set aside a decree passed in an earlier suit and consequential relief of possession in respect of part of the suit property and injunction in respect of the remaining part.

*Appeal Nos. 304 and 660 of 1969. *25th February*, 1975.

2. The property involved in the litigation is a vacant land whose total extent is 14 acres 47 cents and comprised in three Survey Numbers, namely S. No. 755, S. No. 756 and S. No. 94/4 Thottipalayam village, Palladam taluk, Coimbatore district. The land was said to be a waste, but now it has acquired considerable value as house sites. The above said land is described in the A schedule to the plaint, while in Schedules B, C and D, specific portions of the said land are described. There are three plaintiffs in the suit out of whom, plaintiffs 1 and 2 are brothers. They claim title to the portions described in Schedules B and C and they seek to recover possession of those portions from the first defendant in the suit. The third plaintiff claims title to the portion described in D schedule and as he continues to be in possession of the property, he seeks a permanent injunction restraining defendants 2 to 4 to the suit from in any way interfering with the same.

3. O. S. No. 456 of 1950 on the file of the Court of the Subordinate Judge, Coimbatore was a suit for partition and separate possession filed by Shanmugam Chettiar, the first defendant herein, in respect of the abovesaid land. He has purchased a specific plot measuring 3 acres 68 cents in the abovesaid land from the previous owner but he claimed general partition and allotment of the abovesaid extent impleading all the other persons claiming shares in the land. The learned Subordinate Judge who tried O. S. No. 456 of 1950 passed a preliminary decree in favour of Shanmugham Chettiar (the plaintiff in that suit and the first defendant herein) for 4/5th of the entire extent of 14 acres 47 cents of land, the remaining 1/5th going to defendants 2 to 4 herein. There was a final decree in accordance with the abovesaid preliminary decree. The plaintiffs in the present suit were not parties to O. S. No. 456 of 1950 but their predecessors in title were. According to the plaintiffs the decree in O. S. No. 456 of 1950 had been obtained by fraud, that the decree had been passed without jurisdiction and that therefore the same is liable to be set aside. As the first defendant, in pursuance of the decree in O. S. No. 456 of 1950 has taken possession of the B and C schedule plots, which plaintiffs 1 and 2 have purchased from the previous owner, they prayed for possession of those plots. As defendants 2 to 4 were trying to interfere with the possession of the plot described in the D schedule to the plaint, claimed by the third plaintiff, injunction is prayed for in respect of the same.

4. The learned Subordinate Judge, Coimbatore who tried the present suit agreed with the contentions of the plaintiffs and has set aside the decree in O.S. No. 456 of 1950 and granted the other reliefs prayed for by the plaintiffs.

5. The second defendant died during the pendency of the suit and his legal representatives have been impleaded as defendants 5 to 8. The first defendant also died during the pendency of the suit and his legal representatives have been impleaded as defendants 9 to 15. A.S. No. 304 of 1959 is by the legal representatives of the first defendant. A. S. No. 660 of 1969 is filed by defendants 3 and 4 along with the legal representatives of the second defendant (defendants 5 to 8.)

6. Though it has been the case of the plaintiffs in the Court below that the decree in O. S. No. 456 of 1950 was a result of fraud played upon the Court, such a case is not pressed before me by the plaintiffs who are respondents in the two appeals. The only contention is that the decree in that suit (O. S. No. 456 of 1950) is one passed without jurisdiction.

7. Before considering the above question I would dispose of the question of limitation raised on behalf of the defendants. If the contention of the plaintiffs that the Court which passed the decree in O. S. No. 456 of 1950 lacks inherent jurisdiction to pass that decree is correct then the decree is void and that need not be set aside. It can just be ignored. In that event, unless the title to the property is lost by adverse possession, the plaintiff would be entitled to the reliefs claimed. It is not the case of the defendants that the plaintiff's title if any had been lost by adverse possession. Therefore, the real question arising in these two appeals is whether the decree in O. S. No. 456 of 1950 is one passed without jurisdic-

tion. The appreciate the controversy, more facts have to be statea.

8. The land in question along with other lands bearing different Survey Numbers originally belonged to a family of Boyans. According to the plaintiffs the entire land (14 acres 47 cents) belonged to one Peria Palani Boyan. The land was said to have been dealt with in the following manner. The said Peria Palani Boyan executed a simple mortgage over a half share of the property and created a usufructuary mortgage in respect of the other half. The simple mortgage was in favour of one Palani Boyan son of Nanjunda Boyan (referred to as N. Palani Boyan). The usufructuary mortgage was in favour of the said N. Palani Boyan and his brothers Sella Boyan and Mara Boyan. These mortgages were of the year 1876. The equity of redemption in the undivided half share, subject matter of the simple mortgage, had been sold to the mortgagee (N. Palani Boyan) himself. The said N. Palani Boyan, had filed a suit in O. S. No. 51 of 1908 on the file of the District Munsif's Court, Tirupur for enforcing the mortgage but that came to be dismissed because of the above sale. Petha Boyan grandson of Peria Palani Boyan, filed O.S. No. 48 of 1908 on the file of the same Court for redemption of the other half which was the subject-matter of the usufructuary mortgage. That suit came to be decreed by the Court on the same day on which O.S. No. 51 of 1908, came to be dismissed. Petha Boyan got possession through Court of the half share which was the subject-matter of the usufructuary mortgage, and later executed another usufructuary mortgage in favour of one Veerammal who is no other than the daughter-in-law of N. Palani Boyan.

9. The abovesaid Petha Boyan executed two sales, one under Exhibit A-81 dated 4th June, 1938 and the other under Exhibit A-82 dated 21st January, 1943 both in favour of his son T.P. Palaniswami. The equity of redemption in a half share in the land (which had been usufructuarily mortgaged to Veerammal) had been conveyed under those two sales. Eventually T.P. Palaniswami redeemed this half-share from Veerammal.

10. N. Palani Boyan, as already said, had two brothers by name Sella Boyan and Mara Boyan. The purchase of half share by N. Palani Boyan is said to be for the benefit of the family consisting of the abovesaid three brothers. Mara Boyan died and therefore N. Palani Boyan and his brother Sella Boyan were said to be entitled to an undivided 1/4th share each in the entire land. N. Palani Boyan had five sons. After the death of N. Palani Boyan, the five sons became entitled to an undivided 1/20th share in the land. One Chinna Mara Boyan purchased the undivided shares of three of the sons of N. Palani Boyan. He also purchased the 1/4th share of Sella Boyan, the brother of N. Palani Boyan. That apart, he had taken a sale from one Raju Boyan who is said to be the paternal cousin of Petha Boyan in respect of an 1/4th share. This is on the basis that the half share which PethaBoyan had usufructuarily mortgaged to Veerammal, belonged not only to him but also to the above said Raju Boyan.

11. Two sons of N. Palani Boyan had sold their shares to Kandappa Goundar, father of defendants 2 to 4 herein. The several sales in favour of Chinna Mara Boyan referred to above and the sales in favour of Kandappa Goundar were all much earlier than the sale by Petha Boyan in favour of his son T.P. Palaniswami.

12. T.P. Palaniswami filed O.S. No. 90 of 1943 on the file of the Court of the District Munsif, Tirupur for partition and separate possession of the land. By that time Kandappa Goundar had died and out of his three sons (who are now defendants 2 to 4) Venkatappa Gounder alone had been impleaded as a defendant. He seems to have represented the family consisting of himself and the two brothers. Of course Chinna Mara Boyan also was a party to that suit. That suit related not only to the land in question (14 acres 47 cents) but also to another Survey Number, namely Survey Number 94/3 with which we are not now concerned. Chinna Mara Boyan who had taken sales from three sons of N. Palani Boyan 1/20th share each) and Sella Boyan, the brother of N. Palani Boyan 1/4th share) and also from one Raju Boyan, the paternal cousin of Petha Boyan (another 1/4th share) seems to have

claimed in O.S. No. 90 of 1943, a 13/20th share in the land, conceding only 1/4th (5/20th share) to T.P. Palaniswami and 2/20th share to the sons of Kandappa Goundar. But the Court held that T.P. Palaniswami was entitled to a half-share (5/10), that Chinna Mara Boyan was entitled only to 4/10th share and Venkatappa Goundan (the second defendant herein) was entitled to an 1/10th share. This is on the basis that Chinna Mara Boyan did not get any title to any share under the sale executed by Raju Boyan, the paternal cousin of Petha Boyan, as Petha Boyan was full owner of the half share which had been usufructuarily mortgaged to Veerammal. N. Palani Boyan and his brother Sella Boyan were found to be entitled to the other half and therefore by the sale by Sella Boyan, Chinna Mara Boyan became entitled to an 1/4th share (5/20) and by the sales of three out of the five sons of N. Palani Boyan he became entitled to 3/20th share. That is how the Court held that Chinna Mara Boyan was entitled to a 4/10th share.

13. After the preliminary decree but before the final decree in that suit, Chinna Mara Boyan sold his undivided 4/10th share to one Sellamuthu Boyan under Exhibit A-4 dated 29th July, 1946. It was this Sellamuthu who got himself impleaded as a party to O.S.No.90 of 1943 applied for final decree in pursuance of the above said preliminary decree. The final decree was passed on 11th March, 1947 as evidenced by Exhibit A-3.

14. Under the above said final decree, the entire land measuring 14 acres 47 cents had beeen divided into ten plots marked in the plan as A, B, C, D, E, F, G, H, J and K. The plots marked A, B, C and D which are the four westernmost plots were allotted to Sellamuthu. The next plot marked E was allotted to Venkatappa Goundar and all the five plots marked as F, G, H, J and K came to be allotted to T. P. Palaniswami towards his half share.

15. In the meantime, that is during the pendency of O.S.No. 90 of 1943, one Peria Mara Boyan and one Roya Boyan (along with another) who are brothers of Chinna Mara Boyan, filed O.S. No. 336 of 1946 on the file of the Court of District Munsif, Tirupur claiming a share in the land in question. This is on the basis that the purchases made by Chinna Mara Boyan were for the benefit of the family consisting of Chinna Mara Boyan and his brothers. There was also another suit, namely O.S.No.132 of 1947 on the file of the same Court filed by some of the sons of the above said N. Palani Boyan and a grand-son through one of the sons. This again was a suit for partition and the basis of this suit is that by the sales executed by the sons of N. Palani Boyan (two to Kandappa Goundar and three to Chinna Mara Boyan), the share to which the family was entitled had not been exhausted and that some share still remained with the family. These two suits, namely O.S. No. 336 of 1946 and O.S.No.132 of 1947 along with yet another suit which related to some other lands came to be tried jointly by the Court of the District Munsif, Tirupur. By the time the abovesaid suits came up for trial, the final decree in O.S.No. 90 of 1943 had been passed, but the said decree was treated as infructuous on the ground that some of the sharers had not been impleaded in that suit and as O.S.No. 336 of 1946 had been filed even during the pendency of the earlier suit. By the common judgment dated 30th December, 1948, O.S.No. 336 of 1946 was decreed and O.S.No.132 of 1947 was dismissed. On appeal, the cases had been remitted for a fresh trial.

16. Meanwhile, the plaintiffs in O.S.No. 336 of 1946 (Peria Mara Boyan and others) who had claimed joint rights with Chinna Mara Boyan in respect of the purchases made by the latter, giving up that claim took a sale from Sellamuthu Boyan, the purchaser from Chinna Mara Boyan. Exhibit A-6 dated 23rd January, 1948, is the sale in favour of Periya Mara Boyan and Roya Boyan (brothers of Chinna Mara Boyan). Three months thereafter, that is under Exhibit A-124 dated 23rd August, 1948 the said Peria Mara Boyan and Roya Boyan sold to the first defendant herein what they had purchased under Exhibit A-6. The significant fact to be noted is that the property conveyed under these documents is a specific plot with four boundaries, measuring 3 acres 68 cents. This is out of the westernmost four

plots which had been allotted to Sellamuthu in the final decree in O.S. No. 93 of 1943.

17. After the above sale under Exhibit A-124 the first defendant herein got himself impleaded as the fourth plaintiff in O. S. No. 336 of 1946. Ultimately the said suit (O.S.No.336 of 1946) was withdrawn with permission to file a fresh suit on the same cause of action. It is under that permission, the first defendant herein filed O.S.No.456 of 1950 on the file of the Court of the Subordinate Judge, Coimbatore. O. S. No. 132 of 1947 on the file of the Court of the District Munsif, Tirupur which was still pending, was transferred to the file of the Court of the Subordinat Judge, Coimbatore and numbered as O. S. No. 418 of 1950 on the file of that Court to be tried with O.S. No. 456 of 1950. The said Court by a common judgment dated 14th September, 1957 dismissed O.S. No. 418 of 1950 and decreed O.S.No.456 of 1950 declaring that the first defendant herein (plaintiff in that suit) was entitled to a 4/5th share in the entire extent of 14 acres 47 cents and that the remaining 1/5th was to be taken by the sons of the Kandappa Goundar, defendants 2 to 4 herein. As already mentioned, in pursuance of such a preliminary decree in O.S.No.456 of 1950, a final decree was obtained and the first defendant herein had taken possession of a divided 4/5th share in the entire extent. Defendants 2 to 4 herein had also taken possession of their divided 1/5th share, except a small extent therein which is in the possession of the present third plaintiff.

18. Plaintiffs 1 and 2 claim title to the plots described in the schedules B and C to the plaint, under two sale deeds, Exhibit A-60 dated 27th August, 1951 and Exhibit A-79 dated 7th July, 1952, executed by T.P. Palaniswami. As already seen under the decree in O.S.No.90 of 1943, T.P. Palaniswami became entitled to the eastern half share in the entire 14 acres 47 cents. The plots now described in Schedules B and C to the plaint are the said eastern half. But under the subsequent decree that is in O.S.No.455 of 1950 the Court having granted a 4/5th share in the entire extent of 14 acres 47 cents to, the first defendant herein (even though he had purchased only a specific plot measuring 3 acres 68 cents and claimed in the suit the allotment of only that extent), he had taken possession in pursuance of that decree even the plot purchased by plaintiffs 1 and 2 from T.P. Palaniswami.

19. The third plaintiff claims title only to 10 cents of land and that is through Sellamuthu Boyan. Sellamuthu Boyan who sold 3 acres 68 cents (out of the western 4/10th share which he got under the decree in O. S. No. 90 of 1943), to Peria Mara Boyan and Roya Boyan which ultimately came to the first defendant, herein, executed several other sale deeds all in respect of specific plots. Exhibit A-5 is a sale in respect of an extent of 1 acre in favour of one P.N. Ramaswami and one Senga Goundar. Exhibit A-7 is a sale in respect of a plot measuring 50 cents in favour of one V. Palanisami. Exhibit A-8 is in respect of a plot measuring 41 cents in favour of Senga Goundar. There having been a joint purchase by P.N. Ramaswami and Senga Goundar, there wsa a partition under Exhibit A-9. Thereafter, P.N. Ramaswami settled 20 cents (which he got under the above partition) on his son Jagannathan under Exhibit A-17. Out of that 20 cents, 10 cents had been sold by the said Jagannathan to the third plaintiff herein under Exhibit A-18 dated 5th September, 1957, and 10 sents to V. Palaniswamy (brother-in-law of the third plaintiff under Exhibit A-12 dated 19th October, 1957).

20. The point to be noted is that all the plots sold by Sellamuthu were out of the divided western 4/5th of the land which he got under the final decree in O.S.No. 90 of 1943. Under that final decree the total extent which came to Sellamuthu is 5 acres 78 cents being the area covered by the westernmost plots A, B, C and D in the plan in that final decree. Sellamuthu did not purport to sell, by the several sales, anything more than the above extent.

21. The third plaintiff has put up a construction on the 20 cents of land which he and his brother-in-law purchased. Defendants 2 to 4 herein who got only 1/10th share in O.S. No. 90 of 1943 (plot

E in the plan attached to the final decree therein) tried to disturb the possession of the third plaintiff in pursuance of the subsequent decree, that is in O.S. No. 456 of 1950, as under that decree they got 1/5th instead of 1/10th.

22. The contention on behalf of the plaintiffs is that the decree in O.S. No. 456 of 1950 should be treated as a nullity as the Court which passed the said decree had acted without jurisdiction. It is pointed out that the first defendant herein (who was the plaintiff in that suit) having purchased a specific plot measuring 3 acres 68 cents, which is part of the divided 4/10th share which Sellamuthu got under the final decree in O.S. No. 90 of 1943; and he having prayed in that suit only for allotment of that extent to him (even though he claimed general partition the Court had no jurisdiction at all to grant him a decree by which he was to take about 11 acres out of the extent of 14 acres 47 cents as 4/5th share in the entire land. This contention is not without force. It is true that in O.S. No. 456 of 1950, the first defendant has stated in the plaint therein that Chinna Mara Boyan was entitled to 13/20th shares in the entire land, even though under the decree in O.S. No. 90 of 1943 he got only 4/10th share. He had contended so, not because he laid claim for anything more than 3 acres 68 cents which he had purchased, but because the brothers of Chinna Mara Boyan had contended in O.S. No. 336 of 1946 that they also had a share in the land on the basis that the purchases made by Chinna Mara Boyan were on behalf of the family. As already seen, the first defendant herein got himself impleaded as the fourth plaintiff in O.S. No. 336 of 1946 which was later withdrawn with permission to file a fresh suit on the same cause of action, and it is after that he filed O.S. No. 456 of 1950. O.S. No. 132 of 1947 filed by some of the sons and a grand-son of N. Palani Boyan who claimed that in spite of all the five sons of N. Palani Boyan having sold their shares (two to Kandappa Goundar and three to Chinna Mara Boyan) still they are entitled to some share in the land, was also pending. It is under such circumstances, the first defendant who evidently did not want to lose any part of 3 acres 68 cents which he purchased, has contended that Chinna Mara Boyan had acquired 13/20 share by the several purchases he had made. The basis of the claim that Chinna Mara Boyan had 13/20th share is that Raju Boyan, the paternal cousin of Petha Boyan conveyed good title to an 1/4th share, apart from Sella Boyan, brother of N. Palani Boyan conveying 1/4th share and three sons of N. Palani Boyan conveying 1/20th share each. It had been conceded in that plaint that a half share in the land belonged to Petha Boyan's branch even though Petha Boyan's exclusive title to the said half share had not been conceded. According to that plaint, Petha Boyan had an 1/4th share and his cousin Raju Boyan had an 1/4th share and that T.P. Palaniswami, the son of Petha Boyan acquired title from his father only to an 1/4th share and not to a half share.

23. By some reasoning, the learned Judge who decided O.S.No.456 of 1950 held that Petha Boyan's branch had no share at all after Peria Palani Boyan, the grand-father of Petha Boyan, had sold a half share to N. Palani Boyan. He, proceeded on the footing that N. Palani Boyan and his brother Sella Boyan became the owners of the entire extent of 14 acres 47 cents and that by the sale by Sella Boyan, Chinna Mara Boyan got title to a half share and by the sale by three sons of N. Palani Boyan the said Chinna Mara Boyan got 3/5th. This finding is without realisation that Sella Boyan had sold only on 1/4th share and the three sons of N. Palani Boyan who executed sales in favour of Chinna Mara Boyan had conveyed only an 1/120th share each. In paragraph 41 of his judgment, the learned Judge has himself referred to the fact that Sella Boyan sold only an 1/14th share and the three sons of N. Palani Boyan sold only an 1/20th share each to Chinna Mara Boyan. On the finding of the learned Judge that Raju Boyan, (cousin of Petha Boyan) did not convey any title to Chinna MaraBoyan and on the facts found by himself in paragraph 41 referred above, Chinna Mara Boyan ought to have been held to have acquired title only to 4/10 share, as was the finding in the earlier suit namely O.S.No. 90 of 1943.

24. That the learned Judge (who decided O.S.No. 456 of 1950) had completely

missed the controversy in the suit is evident from the curious finding that the first defendant herein (plaintiff in that suit) became entitled to a 4/5th share in the entire 14.47 acres. Needless to say that it is not the case of the first defendant that he was entitled to any such share. It is not even the case that the was entitled to what all Chinna Mara Boyan had become entitled to in the several purchases made by him. All that he claimed was only 3.68 acres which he purchased from out of the divided 4/10th of Chinna Mara Boyan. Different portions of the above-said divided 4/10th share of Chinna Mara Boyan had been sold to the first defendant herein and several other parties. While the first defendant purchased 3.68 acres, P.N. Ramaswami and Senga Goundar purchased 1 acre, B. Palaniswami purchased 50 cents and Senga Goundar purchased 41 cents, all out of the western 4/10th which fell to Chinna Mara Boyan's share in the final decree in O.S. No.90 of 1943, obtained by Sellamuthu Boyan standing in the shoes of Chinna Mara Boyan. Even though the above-said purchasers of different plots from Sellamuthu Boyan were also parties to the suit, the learned Judge did not allot anything to any of them.

25. Senga Goundar and V. Palaniswami had to file A.S.No.98 of 1959 on the file of this Court challenging the decree, and the first defendant herein entered into a compromise with them, got a release of their rights in respect of the plots claimed by them. One Venkatachala Goundar, a subsequent purchaser of a plot who was also a party to that suit filed an application for setting aside the *ex parte* decree against him in O.S.No. 456 of 1950. The second plaintiff in the present suit filed a similar application to set aside the *ex parte* decree against his vendor, namely T.P. Palaniswami. Two other parties to that suit filed similar applications for setting aside the *ex parte* decree against them. On the application filed by Venkatachala Goundar, the Court set aside the decree in its entirety and all the four applications referred above had been allowed. Against that, there were four Civil Revision Petitions to this Court and this Court remitted the applications for fresh consideration. Then the first defendant herein (plaintiff in that suit) compromised the matter with Venkatachala Goundar by giving him 34 cents of land. The other applications to set aside the decree were not further pressed as in the meanwhile the plaintiffs filed the present suit.

26. There can be no doubt that the learned Judge who decided O.S.No. 456 of 1950 had not understood what the controversy was. The decree in O.S.No.90 of 1943 was treated as infructuous on the ground that some of the sharers had not been made parties to that suit. But the learned Judge by the common judgment in O.S.No. 456 of 1950 and O.S.No.418 of 1950 (O.S.No.132 of 1947 on the file of the Court of the District Munsif, Tirupur) did not hold that any of them was entitled to any share. O.S.No.418 of 1950 (O.S.No.132 of 1947) on the file of the Court of the District Munsif, Tirupur) filed by some of the sons and a grand-son of N. Palani Boyan came to be dismissed. Peria Mara Boyan and Roya Boyan the brothers of Chinna Mara Boyan who claimed that Chinna Mara Boyan's purchases were on behalf of their family, had given up such a case and had taken a sale from Sellamuthu Boyan, successor-in-interest of Chinna Mara Boyan of 3.68 acres. They conveyed the same to the first defendant herein which alone the first defendant as the plaintiff in O.S.No.456 of 1950 claimed. But the learned Judge had reallotted the shares as it were only amongst the persons who were parties to the earlier suit (O.S. No.90 of 1943). While in the earlier suit T.P. Palaniswami (the predecessor-in-title of plaintiffs 1 and 2 herein) got 5/10th share, Venkatappa Goundar the second defendant herein (for himself and his brothers defendants 3 and 4 herein) got 1/10th share and Chinna Mara Boyan got 4/10th share, in O.S.No.456 of 1950, the learned Judge held that T. P. Palaniswami was not entitled to any share at all, that defendants 2 to 4 herein were entitled to an 1/5th share and that Chinna Mara Boyan was entitled to a 4/5th share.

27. However erroneous a decree might be, it cannot be set aside or treated as a nullity unless it is shown that the same had been obtained by fraud or that the Court

had jurisdiction to pass such a decree. As pointed out by the Privy Council in *Raj Want Prasad Pande* v. *Mahan Ram Ratan Gir*[1], the method of exercise of the jurisdiction can never in law justify denial of the existence of such jurisdiction. I have already pointed out that the plaintiffs do not contend before me that the decree in O. S. No. 456 of 1950 is vitiated by fraud. Their only case is that the Court had no jurisdiction to pass such a decree. There can be no dispute that a Court would have jurisdiction only to hear matters in controversy. As pointed out by a full Bench of the Calcutta High Court in *H. Nath Roy* v. *R. C. Barna Sarma*[2], jurisdiction of the Court is the power to hear and determine a case, to agitate and exercise any judicial power in relation to it. In other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or takes cognizance of matters presented in a formal way for its decision. If a controversy is presented before Court it has certainly authority to decide such controversy even wrongly. Therefore, the simple question is whether in this case, the Court which decided O. S. No. 456 of 1950 decided only the controversy before it or something which was not in controversy. The learned counsel for the first defendant contends that the issue before the Court was as to what was the share to which the various parties before the Court was entitled and that therefore it cannot be said that the Court had acted without jurisdiction in allotting 4/5 th share to the first defendant (plaintiff in that suit). This is not acceptable. It was already seen that the first defendant as plaintiff had conceded in that plaint that a half share belonged to Petha Boyan's branch though he stated that Raju Boyan (cousin of Petha Royan) had conveyed an 1/4th share to Chinna Mara Boyan. There can be no doubt whatsoever that at least in respect of an 1/4th share which was conceded to Petha Boyan as per the averments in the plaint in O. S. No. 456 of 1950, there was no controversy to be decided by the Court. It is true that in a suit for partition, every defendant who claims a share is also in the position of a plaintiff and that therefore the plaint averments alone are not the criteria to decide what the controversy was. But significantly, none of the defendants to that suit had ever contended that Petha Boyan was not entitled to even that 1/4th share conceded in the plaint. Therefore, there is no escape from the position that in respect of 1/4th share there was no controversy at all. Under such circumstances, the Court had no jurisdiction to decide even in respect of the said 1/4th share.

28. It is true, T. P. Palaniswami, who claimed from Petha Boyan had remained *ex parte* in O. S. No. 456 of 1950, but when his right to at least 1/4th share had been conceded in the plaint, he could have appeared even at the final decree stage to work out his right in respect of such 1/4th share. Because the Court held in the preliminary decree that T. P. Palaniswami was not entitled to any share at all there was no further notice to him in the final decree proceedings. It cannot be disputed that even when a sharer is *ex parte* in the preliminary decree stage, he is entitled to notice in the final decree proceedings, so that he can safeguard his right in respect of his share. But, because, in this case, the Court had exceeded its jurisdiction in deciding a matter which was not in controversy before it and held that T. P. Palaniswami, was not entitled to any share at all, there was no further notice to him in the final decree proceedings.

29. *Navaneethammal* v. *Ammakannamal*[1], referred to by the learned counsel for the first defendant has no application here. What is pointed out there is that when the Court has jurisdiction over the subject-matter, but arrives at an erroneous decision it cannot be ignored as a nullity. There can be no dispute about the above proposition but in the present case, the Court had purported to decide a matter which was not in controversy before it and therefore it had acted wholly

1. 42 I.A. 171 : 29 M.L.J. 165: 2 L.W. 671: 30 I.C. 849: A.I.R. 1915 P.C. 99.
2. A.I.R. 1921 Cal. 34 (F.B.).

1. I.L.R. (1945) Mad. 216 : 218 I.C. 58 : (1944) 2 M.L.J. 67 : A.I.R. 1944 Mad. 513.

without jurisdiction and it is not merely an erroneous exercise of jurisdiction: *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*[1], referred to by the learned counsel for the first defendant is also of no help to him. That is a case of a suit for recovery of rent as per a kabuliyat. The defendants in that suit pleaded abatement of rent because of an injunction granted against them in an earlier suit, which injunction was wider in scope than the one asked for in the said earlier suit. The Privy Council held that the defendants were not entitled to abatement of rent as they have failed to prove any fact which would entitle them to any abatement of the rent fixed by the kabuliyat. The question whether the injunction granted in the earlier suit which was wider in scope than that prayed for was without jurisdiction, did not fall for consideration.

30. The result is both the appeals fail and they are dismissed but under the circumstances of the case I make no order as to costs.

S.J. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

The Collector of Madras .. *Appellant**

v.

E. K. Pattabirama Reddy and others .. *Respondents.*

Land Acquisition Act (1 of 1894)—Lessor and lessee—Apportionment of compensation—Lease of land—Lessee spending considerable money for reclamation for using it for a particular purpose—Acquisition of land demised by Government—Public purpose—Lessee entitled to compensation for unexpired period of lease.

The lessee of the demised land, which is subject, to the process of compulsory acquisition has undoubtedly an interest in the land which is conceivable and which has to be evaluated for the purpose of reckoning compensation payable to him as a result of its acquisition. A lease like a mortgage is an encumbrance on the land. When the land acquisition process is complete, the acquired land vests in the Government free from encumbrance. If therefore, a lease is an encumbrance, than it has a value which is popularly understood and construed as market value. If the lease is for a defined period, then the right of the lessee to remain in the land without any let or hindrance by the lessor for the unexpired period of the lease is also a right in jurisprudence, which has a value and which has to be computed in the given situation. In fact, the principle appears to be that in assessing the lessee's interest, he will be entitled to compensation for the loss of the right of occupancy of the acquired land and towards its value for the unexpired term. That a lessee is entitled to compensation appears to be a well-recognised rule of equity. In the instant case, the lessee, has the right to occupy the acquired land for a period of 8 years after the date of acquisition which is the unexpired period of lease. Considerations of justice, require that some useful aid should be found for reckoning the value of the interests of the lessor as well as the lessee. Broadly speaking the property acquired should be evaluated as one unit whereby both the interests of the lessor and the lessee are evaluated and by the adoption of a reasonable yardstick the total compensation money could be apportioned between the two interests, namely the lessor and the lessee. The other alternative method is by evaluating each of the interests if cogent and acceptable evidence is available to value them. Which method is to be applied in a given case will depend upon the circumstances and principles of ordinary canons of justice. [*Paras.* 7 and 8.]

The principle of apportionment of compensation as between the lessor and the tenant may arise in a case where there is no evidence regarding the market value of the interest of the tenant and the landlord individually. But in cases where there is available evidence which would assist the Court not only to evaluate the

1. 40 I.A. 223 : 26 M.L.J. 25: 21 I.C. 750: I.L.R. 41 Cal. 493 (P.C.).

*Appeal Nos. 10, 467, 482 and 566 of 1970. 18*th March,* 1975.

lessor's interest but also the lessee's interest, the question of apportionment of compensation after reckoning the totality of compensation payable for the acquired land would not arise. [*Para.* 9.]

Case referred to :

Ramachandraiah v. *Land Acquisition Officer, Sagar,* (1973) 3 S.C.R. 262: A.I.R. 1973 S.C.701.

Appeals against the decree of the City Civil Court (IV Assistant Judge) Madras dated 11th October, 1968 in L.A.C.No. 107 of 1967 (Appeal No. 10 of 1967) dated 11th October, 1968 in L.A.C.Nos.109, 111 and 112 of 1967 (Appeal No. 467 of 1970) in (A.C. Nos. 110 of 1967 (Appeal No. 482 of 1970) and L.A.C. No. 198 of 1967 and 36 of 1968 (Appeal No. 566 of 1970). These appeals coming on for hearing on Monday the 10th March, 1975 and this day the Court delivered the following Judgment.

The Additional Government Pleader, for Appellant.

P. Jayachandra Naidu, T.V. Ramanathan, P. N. Lakshmanan, K. Kumaraswami, P. Kannan and *H.N. Markandan,* for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao J.—In these four appeals preferred by the Government, common questions arise. The properties which are the subject-matter of these four appeals are comprised in Survey Numbers 29, 30/1, 30/2, 31, 32 and 34. The Extents acquired in each of the above survey fields can be catalogued thus :

In S. No. 29	Ac. 2	34 cents
In S. No. 30/1	Ac. 2	33 cents
In S. No. 30/2	Ac. 2	33 cents
In S. No. 31	Ac. 0	72 cents
In S. No. 32	Ac. 9	91 cents
In S. No. 34	Ac. 1	79 cents.

The above properties were acquired for the purpose of extending the Industrial Estate at Guindy. Notification under section 4 (1) of the Land Acquisition Act was made on 29th September, 1965 the declaration under section 6, on 18th July, 1966 and on 3rd April, 1967 the properties were taken possession of by the State Government. The Land Acquisition Officer, who enquired into the market value of the properties, the superstructures, the wells and the interests of other affected parties, gave a compensation of Rs. 1,500 per ground and varied amounts in respect of the superstructures and the wells found in the properties. Whilst arriving at the nett amount of compensation payable to the persons interested, the Land Acquisition Officer deducted a sum of Rs. 100 per ground in certain survey numbers as above which expense, according to the acquisition officer, was necessary to raise the level of the land by one foot. In one case, which is the subject-matter of appeal in A. S. No. 566 of 1970, there was a lessee who was in occupation of Survey No. 30/1 and Survey No. 34 pursuant to a lease entered into between him and the landlord under Exhibit C-16 dated 9th December, 1964 which is admittedly an unregistered lease deed in relation to immovable property which he obtained from the landlord. Under the lease the lessee who is one of the claimants in L.A.C. No. 108 of 1967 (subject-matter of appeal in A.S.No. 566 of 1970) claims that he levelled the land and manured it so as to raise jasmine plants, roses, marudhani, Rangoon malli etc., and that after having spent such considerable sums for reclamation of the land for using it for a particular purpose for which the lease of the land was taken, the lessee claimed that he was, on the average, earning a sum of Rs. 5,000 per year as and towards his income and that he has been deprived of such income during the unexpired period of the lease and on that ground, he claimed a compensation of Rs. 2,42,366. The Land Acquisition Officer awarded damages at the rate of Rs. 500 for eight years towards the loss of income for the unexpired period of the lease. The learned City Civil Judge, however, after considering the oral evidence, was satisfied that for the unexpired period of the lease, the lessee was entitled to damages at the rate of Rs. 1,000 per year for the eight years of lease to follow after acquisition. The State Government is aggrieved by the grant of Rs.3,000 per ground as such to the various owners of the lands which were the subject-matter of compulsory acquisi-

tion and they are equally aggrieved by the quantum of compensation given by the Court below with regard to the superstructures and the wells in the acquired lands and in particular, they would attack the grant of a sum of Rs. 1,000 per year as damages to the lessee for the unexpired period of eight years in L. A. C. No. 108 of 1967 (subject-matter of Appeal No. 566 of 1970) and they would also contend that the deduction of Rs. 40 per ground by the Court below as the amount required for raising the level of the acquired land by one foot wherever it is necessary, is not fair and just and that the Land Acquisition Officer's estimate of Rs. 100 per ground to raise the level of the land would be reasonable. Learned counsel for the claimants would sustain the judgment of the Court below in all its aspects. With regard to the reduction of the reclamation charges from Rs. 100 to Rs. 40 by the Court below, it is said that the said sum of Rs. 40 per ground was the scale adopted by the High Court in similar circumstances in 1958 and that there being no reasonable hypothesis to interfere with such a quantification, the award of the Court below has to be sustained. On the contrary the learned Government Pleader would say that even taking into consideration the normal increase attendant upon such reclamation process such as the cost of labour, cost of material etc., the reduction made by the Court below on such reclamation charges from Rs. 100 to Rs. 40 is not justified. The bone of contention, however, is about the grant of Rs. 8,000 to the lessee of the land comprised in Survey No. 30/1 and 34. Whilst the Government Pleader would say that the lessee is not entitled to any amount at all, after the Land Acquisition process was undertaken by the State, Mr. Kumaraswami, learned counsel for the lessee (the affected or interested person) would urge that the grant of Rs. 1,000 as the estimated loss of the lessee who took over the land for the specific purpose of raising flower plants in it and for exploiting the same in that direction, is a necessary concomitant which has to be considered by the Courts vested with the jurisdiction to grant compensation to interested persons, and, so viewed, the lower Court was right in granting such compensation to him. The Government Pleader, however, would urge that, once the landlord was given compensation by reason of the compulsory, acquisition, then the land is no longer available to the lessee for him to utilise the same and exploit the same for his business purposes, and in the absence of such land, the claim for profits by use and occupation of the non-existent land is a myth and ought not to be, therefore, countenanced. His further case is that if the lessee is also paid damages as awarded by the Court below, it would be tantamount to the award of double compensation for a single acquisition under two different heads, which grant cannot be made either under section 23 of the Land Acquisition Act or otherwise.

2. We have heard arguments and looked into the relevant papers. We are not inclined, for a moment, to disturb the grant of compensation made by the Court below in relation to the huts or superstructures, samadhis, kavalawari cement tub and the other small structures in the lands acquired. We confirm the valuations made by the Court below as regards the said huts etc.

3. A vague argument, however, was addressed before us regarding the increased valuation of the wells granted by the Court below in Survey Nos. 30/1 34 and 32. The claimants however, examined an expert on their side who visited the site and deposed as C. W. 6 that in T. S. No. 30/1 there is a well with 16 foot diameter and its construction is pucca and its age could be predicted as ten years only. He also spoke about the well in T. S. No. 34 which is of 10 feet diameter. Similarly, he referred to the valuation of the other wells in the other survey numbers. This categorical evidence has not been squarely repudiated or corrected by the State. Except for filling of the report, Exhibit R-4 made by one of their officers who speculated about the age of the wells and who was not sure about the value thereof, no clinching evidence has been placed before us to find that the valuation of the wells as given by the Court below is excessive or unjustified. The well in T. S. No. 30/1 is 16 feet in diameter. The Land Acquisition Officer fixed the value of the well at a ridiculously low amount of Rs. 1,233.

Having regard to the evidence of C. W. 6, and accepting his evidence as regards the construction and the age of the well, the Court below revised it to Rs. 4,000. Nothing has been placed before us to disturb this re-evaluation made by the Court on the evidence of C. W. 6. The Departmental Officer would say that the age of the well could be about fifty years. But, on what basis he says so is not clear. When at sight the well is pucca and C. W. 6 who is also a responsible person says that the well was in a proper condition at the time when the land was acquired and when he scraped the well it was so hard and he was satisfied that there was cement plastering over the brick construction, we are not inclined to interfere with the valuation of the Court below. Similarly, the values fixed by the Court when it increased the value of the well in S. No. 34 from Rs. 300 to Rs. 1,000 and the value of the well in Survey No. 32 from Rs. 300 to Rs. 750 were fixed by the Court below after appreciating the evidence let in. As we said already, the only contrary evidence let in by the State is the report of the Officer, which is not only perfunctory, but appears to be based on opinion evidence. Taking all these circumstances into consideration, we are not inclined to disturb the value of the wells as granted by the Court below.

4. This leaves us to the two contentions which are practically the bone of contention as between the interested parties before us. We shall now take up the first question. According to the Government Pleader, the reduction of the reclamation charges from Rs. 100 to Rs. 40 made by the Court below in order to raise the level of the land is neither justified nor based on any acceptable data. The lower Court thought that since the High Court fixed such reclamation charges in the vicinity in or about 1958 at Rs. 40 per ground per one foot, such a valuation has to be adopted even in the year 1965 when the properties under consideration were the subject-matter of compulsory acquisition. We do not agree. The Land Acquisition Officer has deducted the sum of Rs. 100 per ground so as to raise the level of the land by one foot. Equally there is no basis for this. The Government Pleader, however, would rely upon the value adopted by the State Housing Board which is about Rs. 192 per ground for raising one foot in one ground of land. The State has filed Exhibits R-6 to R-10 showing the level of the lands and the extent of the low-lying area in each of the survey numbers acquired. Whilst the reclamation charges, therefore, are based on pure estimate the case of the claimants in that in the absence of any scientific method by which the actual level of the land could be gauged and measured, it is said that, the evidence of the witnesses examined on the side of the State ought not to be relied upon. That some of the lands under consideration are low-lying cannot be disputed, since the case of the claimants is that the earth has been removed because of the fall of some trees in the land. It is a far-fetched story. On the other hand the contention of the State through its officers that the earth has been removed for the purpose of brick-making appears to be acceptable and true. We therefore find that the lands are low-lying, since mud has been deliberately removed from the lands and the claimants should suffer reclamation charges by reason of the undisputed low level of the lands acquired. Having regard to the fact that the High Court fixed a sum of Rs. 40 per ground whilst similar lands were acquired in the neighbourhood but in the year 1958, we are of the view that, noting the increase in the cost of such earth and in the cost of labour, a sum of Rs. 75 per ground to raise the level of the lands set out below by one foot would be the reasonable expense which the claimants should bear. We therefore raise the reclamation charges from Rs. 40 to Rs. 75 and such reclamation charges have to be borne by the claimants who own the lands described below, to the extent of the low-lying areas mentioned as against each of the survey numbers :

T.S.No.	*Extent covered by the low lying portion* Gr. Sq ft	*Average depth*
29	12-0984	6 feet
	17-1375	2 feet
30/1	14-1758	4 feet
30/2	15-0646	4 feet

31	2-1200	3 feet
32	8-1240	3 feet
	3-1760	2 feet
	4-0640	1 feet

5. The next point that arises in these appeals is whether P. W. 5 the lessee of properties in T. S. No. 30/1 and 34 had an existing right in the property acquired on the date of acquisition and whether he would be entitled to compensation in relation to such vested right in him. It is common ground that on the date of acquisition, the lessee could remain in the property for a period of 8 years after the date of the acquisition. The claim of the lessee is that during the unexpired period of 8 years he has a right to occupy the land, exploit the same for the purposes of his business and for which he took the land on lease from the lessor-owner. His claim is that he was getting a net income of Rs. 5,000 to Rs. 6,000 per year. Though he purported to produce a so-called lease deed, Exhilt C-16 as evidence of his right as lessee as above, yet as the same was an unregistered document, the Court below as well as the Land Acquisition Officer could not rightly place any reliance on it. But as the facts are not in dispute it could safely be taken that there was still a period of 8 years to go before the owner could dislodge the lessee from his occupation of the land. We have referred to the fact that the lessee is said to have spent large amounts towards reclaiming the land and for raising rare plants like jasmin, rose, marudhani, Rangoon Malli, Lilly etc. He also produced certain accounts to prove the income which he was obtaining by exploiting the land for the above purposes. Exhibits C-12 and C-13 *prima facie* show that the lessee was earning about Rs. 5,000 and more during the years 1963-65. On the basis of this and as his business has entirely been snapped on account of the compulsory process, the lessee claimed a total compensation of Rs. 2,42,366. The Land Acquisition Officer in his award conceded that the lessee had a right which was marketable and he felt that a sum of Rs. 500 per annum towards loss of income to the lessee (though he called in damages) for the unexpired period of 8 years would be sufficient. He also awarded a sum of Rs. 150 towards the value of the structures, Rs.100 towards value of the trees and a sum of Rs. 25 towards shifting charge and he reckoned the compensation on that basis. The learned City Civil Judge, on reference also accepted on principle that the lessee was entitled to compensation for the snapping of his business for a continous period of 8 years during which period he could have earned his livelihood by exercising his profession as above. After considering the evidence which was not quite satsifactory, but without eschewing the same in toto, the learned Judge came to the conclusion that a sum of Rs.1,000 per year to the lessee towards loss of his business and the cessation of his right as lessee over the property would, in the circumstances be reasonable. He therefore awarded a sum of Rs. 8,000 as and towards the value of the right of the lessee as above and a further sum of Rs.25 towards shifting charges (shifting the motor from the acquired land) Rs.250 towards the value of the structure and Rs.100 for trees. He have in addition, the usual solatium of 15 per cent. on the amount awarded. The State has preferred A.S.No.566 of 1970 challendging the allowance of compensation to the lessee at the above rates as also the grant of the solatium on the amount of compensation given.

6. In the course of the arguments, the learned Government Pleader raised the contention that the lessee has only an incomplete or an inchoate interest in the land and once the entirety of the property is acquired under the Land Acquisition Act the lessee's interest permanently disappears and he cannot therefore claim any compensation under any head whatsoever. On the other hand, Mr. Kumaraswami, learned counsel for the respondent-lessee would say that the interest of the lessee is a computable interest and is not an unpredictable one. He would refer to the fact that the Land Acquisition Officer himself conceded that the lessee in so far as the unexpired period of the lease is concerned has interest in the land and has to be treated as an interested person within the meaning of the provisions of the Land Acquisition Act and in that context the right of the lessee has been

correctly evaluated by the Court below and the compensation granted by it is not in any way excessive. The question arises that in the case of such evaluation of leasehold interest what would be the normal principle which ought to be applied while evaluating *inter se* the rights of a lessor and that of a lessee. The question would not present any difficulty if the lease is a permanent lease. In such cases, the totality of the property has to be evaluated and its market price ascertained and the lessee granted a portion of it in accordance with the principles governing such land tenure, but in a case where the lease is for a particular duration and the land acquisition process is set in motion whilst the period of lease is still subsisting, then the problem becomes rather difficult to solve.

. . . . . .

7. The lessee of the demised land, which is subject, to the process of compulsory acquisition has undoubtedly an interest in the land which is conceivable and which has to be evaluated for the purposes of reckoning compensation payable to him as a result of such acquisition. A lease like a mortgage is an encumbrance on the land. When the land acquisition process is complete, the acquired land vests in the Government free from encumbrance. See section 16 of the Land Acqusition Act. If, therefore, a lease is an encumbrance, then it has a value which is popularly understood and construed as market value. If the lease is for a defined period, then the right of the lessee to remain in the land without any let or hindrance by the lessor for the unexpired period of the lease is also a right in jurisprudence, which has a value and which has to be computed in the given situation. In fact, the principle appears to be that in assessing the lessee's interest, he will be entitled to compensation for the loss of the right of occupancy of the acquired land and towards its value of the unexpired term. In Halsbury's Laws of England, Third Edition, Volume 10, paragraph 286, the following passage occurs :

> "The extent of the disturbance to the lessee will be affected by the length of his term. It may also be difficult on occasions to distinguish between the value of the lessee's interest and the disturbance .... If the tenant is entitled to a renewal that right must be taken into account.".

That a lessee is entitled to compensation appears to be a well-recognised rule of equity. The Supreme Court in *Ramachandriah* v. *Land Acquisition Officer, Sagar*[1], was considering a case where the tenants were not represented in a land acquisition proceeding. The Supreme Court said that "The District Judge ought to have ascertained whether the tenants had any interest in the land and whether they were entitled to any share in the compensation payable in respect of lands under their cultivation ......" We do feel that in fairness to tenants, their interests ought to have been ascertained and if they are entitled in law to any share, compensation according to the market value of the land should be ascertained afresh and share, if allowable to them, should be allocated to them". We have already referred to the fact that a lessee who is having a right of renewal is also entitled to come to Court as a person interested and seek for compensation on the ground that he has such a right of renewal and that is being destroyed by the compulsory process of acquisition. Such a right of renewal, however, should be a certain right and not a vague one and if on adjudication by the Tribunal it is found that it is an existing enforceable right, then the covenant of option of renewal also has to be taken into account for assessing the lessee's proportion of compensation money. Each case has to be decided on its own merits on appreciating the true value of such relative and respective rights as between the lessor and the lessee.

8. In the instant case, however, the question of renewal does not arise. The lessee undoubtedly has the right to occupy the acquired land for a period of 8 years after the date of acquisition which is the unexpired period of the lease. In such cases, considerations of justice require that some useful aid should be found for reckoning the value of the interest of the lessor as well as the lessee. Broadly speaking, the property acquired should

1. (1973) 3 S.C.R. 262 : A.I.R. 1973 S.C. 701.

be evaluated as one unit whereby both the interests of the lessor and the lessee are evaluated and by the adoption of a reasonable yardstick the total compensation money could be apportioned between the two interests, namely the lessor and the lessee. The other alternative method is by evaluating each of the interests of the lessor as well as the lessee if cogent and acceptable evidence is avilable to value them. As we said which method is to be applied in a given case will depend upon the circumstances and principles of ordinary canons of justices.

9. The principle of apportionment of compensation as between the lessor and the tenant may arise in a case where there is no evidence regarding the market value of the interest of the tenant and the land individually. We have already noticed that apportionment of compensation as between the landlord and the tenant would become necessary if the property is evaluated as a whole and as one unit. But in cases where there is available evidence which would assist the Court not only to evaluate the lessor's interest but also the lessee's interest, the question of apportionment of compensation after reckoning the totality of compensation payable for the acquired land would not arise. In the case under consideration, there is independent evidence regarding the interest of the intenant as well as the land. In the interests of justice therefore we prefer in the instant case to adopt the alternative method as was done by the Land Acquisition Officer himself and ascertain the value of the right to which the lessee is entitled in the instant case.

10. There is no serious challenge in the case before us in the matter of the profits which the lessee could have reasonably obtained from his business or to be more specific in the matter of exploitation of the land for the purpose of his flower business. The account books though not kept regulates in the strict sense of the term have gained acceptance with the Court below. Though the State has appealed it has not produced a tittle of evidence to show that the lessee could not have derived any income from the land. The estimate of income made by the Court below appears to be reasonable. This was based on the evidence let in by the tenant and not the result of a whim or fancy made by the trial Judge. In the presence of such acceptable evidence it is easy therefore to compute the right of the lessee in terms of money as was done by the Land Acquisition Officer and the Court on reference. We accept in the circumstances of this case, that a sum of Rs. 1,000 per year as compensation to the lessee is a reasonable grant. In these circumstances and as independent evidence is available, and as such evidence cannot lightly be brushed aside or totally eschewed we adopt the alternative method of valuation and find that the right of the lessee who has been disturbed from occupying the land for the unexpired period of 8 years, in the instant case, be evaluated at Rs. 8,000 in all. We are not, however, disturbing the grant made by the Court below in the matter of the shifting charges of Rs.25, the value of the superstructure to be Rs. 250 and the value of the trees found at Rs. 100. On the aforesaid amount, the lessee would be entitled to the usual 15 per cent solatium. This appeal therefore has to fail.

11. The only other question that remains for consideration is whether the Court was right in fixing a sum of Rs. 3,000 per ground as the value of the lands which were acquired for the scheme in question. The notification under section 4 (1) was made on 29th September, 1965 and this is therefore the date on which the properties have to be evaluated. In the absence of values of similar lands in the vicinity as was stated by the Land Acquisition Officer, a certain amount of guesswork has to enter into the computation. In such cases no exactitude could be expected in the valuation of the lands acquired. The claimants relied on Exhibit C-1 dated 14th April, 1965, which was a sale deed under which one half of a ground of land was sold for Rs. 1,900 which makes the market value of the land which was the subject matter of sale under Exhibit C-1 as Rs. 3,800 per ground. The State relied upon Exhibit R-5 dated 15th August, 1964. Exhibit R-5 relates to a sale of land of an extent of 2200 sq. ft. in S.No. 42 which is far to the west of the acquired land and the sale price of that land works out to Rs. 1,900 per ground. The evidence let in on the side of the claimants discloses that the property acquired is within city limits, to wit, 100th Division

of the Corporation of Madras and that it has the facility of good water, air and has the potentiality of being developed into a building site. It is in the midst of an industrial area and the contention is that it could be used even as an industrial site. There is the Hindustan Teleprinter Colony to the west of this property and the King Institute Pump Water Works on the south and also the Industrial Estate Colony around this property. The case of the Government as evidenced in the award is that the property is undeveloped and that there are no roads around this property and there is no such potential as is spoken to by the claimants. The Land Acquisition Officer evaluated the property at Rs. 1,500 per ground ignoring in part Exhibit R-5 as according to him, 25 per cent of the value under Exhibit R-5 has to be deducted from the sale price for providing roads inside this colony. Normally the cost of improvement is deducted in a case where there is a well-laid plan and there is evidence about such contemplated improvements by providing roads therein. In the absence of any evidence to that effect, an automatic deduction of 25 per cent from the price disclosed in Exhibit R-5 is not normally justified. The question is, whether Exhibit R-5 is a safe guide for fixing the market value of the property. In any view, it is not. The land comprised in Exhibit R-5 is situate beyond the City limits whilst the property acquired is within the City limits. It has certain advantages which are very similar to those in the vicinity of the area. One such land which is close by is the land covered by the sale deed Exhibit C-1. The price paid under Exhibit C-1 for a land similarly situated and having similar potential is Rs. 3,800 per ground. But having regard to the fact that the land covered under Exhibit C-1 was in the midst of a fully developed area, the Court below reduced the price by Rs. 800 and fixed the market value of the land at Rs. 3,000 per ground. We do not see any particular reason why we should interfere with such fixation of the price as no contrary evidence which is acceptable by us has been placed before us to disturb the evaluation made by the Land Acquisition Officer.

12. In the result therefore the appeals filed by the Government questioning the grant of compensation at Rs. 3,000 per ground to the lands acquired for the purpose of the extension of the Industrial Estate, Gundy fail. We have already dealt with the other aspect. All the appeals excepting A.S. No. 482 of 1970 are dismissed with costs, except in regard to the raising of the reclamation charges from Rs. 40 to Rs. 75 as pointed out by us already, which shall of course be deducted from the total compensation. A.S. No. 428 of 1970 is dismissed. No costs.

R.S. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

Thiruvalanjuli Vaidyalingam Pillai Charities, Tiruvalanjuli, represented by its Trustees (1) S. Narayanaswami Iyer and others .. *Petitioners**

v.

T. A. Thavasiah .. *Respondent.*

Hindu Law — Charitable Trust—Scheme framed by Court—Application by descendant of by settlor for modification of the scheme—Exercise of suo motu *powers by Courts.*

Exercise of *suo motu* powers by Courts or Tribunals, which are vested with them, is not thought of by a mere revelation or by imagination. Courts are prompted to exercise such *suo motu* powers only when they are provoked to do so. Such a provocation to act may occur in a myriad ways. One such process by which a Court may be prompted to invoke its *suo motu* power is by being appraised of certain matters and situations. It may be that such a matter or situation has been brought up before it in an irregular way ; nevertheless, such apprisement of material and knowledge of situations cannot be lightly ignored by the Court when it is of the view that such matter and situation requires investigation and consideration at its hands.

[*Para.* 4.]

* C.R.P. No. 2481 of 1973. 12*th September*, 1975

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Kumbakonam dated 24th September, 1973 and made in I. A. No. 102 of 1973 in O.S. Nos. 77 and 78 of 1916 (Scheme Suits) (I. A. No. 252 of 1974 in C. M. A. No. of 1974 on the file of the District Court, West Thanjavur at Thanjavur).

K. Raman, for Petitioners.

M. Ram Mohan, for *R. Sundaralingam* and *R. Ramalkrishna Babu*, for Respondent.

The Court made the following

ORDER.—In this revision petition, Mr. Raman raises an interesting point in the first instance, whether the Court can, on an application by a descendant of the author of the trust, modify a scheme in a manner not even asked for by him. On a perusal of the records, I am satisfied that the lower Court acted *suo motu* rather than primarily on the application made by one of the descendants.

2. As early as in 1916, a scheme was framed for Thiruvalanjuli Vaidyalingam Pillai's Charities, in a scheme suit filed for the purpose in the Court of the Subordinate Judge, Kumbakonam in O.S. Nos. 77 and 78 of 1916. The terms of the Scheme are not in dispute. *Inter alia*, clauses 5 and 21 run as follows :—

> *Clause* 5: The management of these charities, its affairs and its properties shall vest in a body of 3 trustees, one of whom shall be a brahmin of the Saiva or Smartha sect and the other two caste Hindus of the Saiva sect and they shall be appointed by the Court from the permanent residents of Kumbakonam Taluk. One of the three trustees may preferably and if the Court does not think it unfit, be from among the trustees of the temple who have been appointed by the temple committee, Kumbakonam under Act XX of 1863 or any Act that takes its place.
>
> *Clause* 21 : The Court shall have power to alter or amend this scheme according to the requirements of the institution either of its own accord or on the application of any of the parties hereto or of the trustees or of any five worshippers.

Taking advantage of the omnibus provision regarding the amendment as is seen from clause 21, one of the daughter's sons of the founder of the charities filed I.A. No. 102 of 1973 praying for an amendment of certain clauses in the scheme. He would, in his petition for amendment make particular reference to clause 5 and would request the Court to amend it as follows :

> " The management of the charities shall vest in the line of succession of Kalyanasundaram Pillai, *i.e.*, the eldest son on the line of succession in the management of the trust properties, and the appointment of third party trustees will arise only if there is none in the line of succession of Kalyanasundaram Pillai."

He suggested certain incidental amendments, but did not go beyond them. The learned Subordinate Judge, after hearing the trustees who are on the board. referred to the fact that the petitioner owned moneys to the trust that there was a decree for mens profits and costs against him in O.S. No. 33 of 1955 on the file of the same court and that execution proceedings for realisation of the same were pending. He entertained a doubt whether it was advisable to alter the very fundamental character of the charities and convert it more or less into a family trust. After considering the scope of clause 5 of the scheme as it is in vogue now, the learned Judge said that having regard to the passage of time, it was not necessary that the body of trustees should be appointed on the basis of caste or sect. Having been apprised of the position and he having got seisin of the matter he exercised jurisdiction *suo motu* under clause 21 of the scheme though the subject-matter was brought up to him in the form of a petition by one of the descendants of the founder of the trust. In exercise of such jurisdiction, the Court came to the conclusion that clause 5 needs some modification and amended the same as to read :

> " The management of the charities and its affairs and properties shall vest in a

body of three trustees, professing Hindu religion, appointed by the Court from the permanent residents of the Kumbakonam Taluk. The management,—Trusteeship shall be held among them in turn, each trustee for one year at a time."

Consequent upon such an amendment having been made by the learned Subordinate Judge, the trustees have come up to this Court challenging the order of the Court below.

3. As I said, Mr. Raman originally raised the contention that the lower Court could not exercise such jurisdiction under clause 21 when it did not think about amending the scheme by itself. When such an application was made by the petitioner as a descendant, it should have been treated and dealt with as such and the Court ought not to have assumed the residuary powers in it to amend the scheme *suo motu* on the information so furnished by the petitioner in an application which is not maintainable in law.

4. No doubt, under clause 21, an amendment of the scheme is possible and the Court shall have the power to make such alterations or amendments according to the requirements of the insitution, either of its own accord or on the application of any of the "parties hereto" or of the trustees or of any five worshippers. The word "parties hereto" obviously referred to the parties who were agitating the subject-matter in 1916 in the Sub-Court when they sought for the framing of a scheme. The only other categories of persons who could apply for such an alteration or amendment under clause 21 of the scheme are (*a*) the trustees themselves or any one of them and (*b*) any five worshippers. The petitioner had undoubtedly no *locus standi* to apply for such an amendment. He does not fit in the description of the categories of persons who by express reference in clause 21 are permitted to move the Court for alteration or amendments of the scheme. The puestion, however, remains whether the *suo motu* power of the court to amend or alter the scheme is taken away by reason of a person coming to Court seeking for such amendment, but which application is not maintainable under Clause 21 of the scheme. Exercise of *suo motu* powers by Courts or Tribunals which are vested with them, is not thought of by a mere revelation or by imagination. Courts are prompted to exercise such *suo motu* powers only when they are provoked to do so. Such a provocation to act may occur in myriad ways. On such process by which a Court may be prompted to invoke its *suo motu* power is by being apprised of certain matters and situations. It may be that such a matter or situation has been brought up before it in an irregular way; nevertheless such apprisement of material and knowledge of situations cannot be lightly ignored by the Court who has the right to exercise the *suo motu* powers when it is of the view that such matter and situation requires investigation and consideration at its hands. Obviously, the Court below, on being apprised of the particular situation and after being informed by the petitioner that clause 5, having regard to passage of time, needs a revision thought it proper and just to invoke its *suo motu* power under clause 21 and amend the scheme. Though, therefore, the argument of Mr. Raman is attractive in the first instance, yet having regard to the fact that there is no exhaustion of the *suo motu* powers by reason of an irregular application made by a third party, the Court in having attempted to amend the scheme decree did not exceed its jurisdiction.

5. The next question is whether the amendment as was done by the Court below is justified and proper, and whether there has been an irregular exercise of jurisdiction when the Court amended clause 5 of the scheme in the manner it did. As already stated, the learned Subordinate Judge has stated that in the present change of times, it is not necessary that the trustees should be appointed on caste or sect basis. In 1916, when the scheme was framed, the Court thought of a body of three trustees, one of whom shall be a Brahmin of the Saiva or Smartha sect and the other two caste Hindus of the Saiva sect. Our country being secular and the Constitution not providing for such differentiation on the basis of caste, the venture of the learned Subordinate Judge in having enterprisingly cast an amendment to clause 5 of the scheme decree, is beyond

reproach and condemnation. In fact, Mr. Raman also says that the phrase "professing Hindu Religion" being all embracing and as it also includes within its fold Brahmins or persons who are not Brahmins, he does not attack the language deployed by the learned Subordinate Judge when he modified the scheme. I am also of the view that the modification made by the Judge does not interfere with the spirit of the quondam clause in the Scheme. There has been, therefore, no irregular exercise of jurisdiction by the learned Subordinate Judge when he altered the scheme by introducing the expression "trustees professing Hindu religion" instead of "trustees of whom one shall be a Brahmin and the other two caste Hindus".

6. In these circumstances, the civil revision petition fails and is dismissed. No order as to costs.

R.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: —*T. Ramaprasada Rao and S. Ratnavel Pondian, JJ.*

Ilango Minor and another .. *Appellants**

v.

T. S. Gopalakrishnan and others .. *Respondents*

Limitation Act (XXXVI of 1963), Article 107—" Annathana Chatram "—Trusteeship vested in two families—No male issue in one family—Trustee surrendering in favour of co-trustee—Exclusive management by co-trustee for over twelve years—Claim by successor in interest in the other family to trusteeship—Whether barred.

In cases of private trusts, the modes by which trustees are ordained to hold their office as such is generally set out in the recitals of the relative trust deed itself. In the absence of any such deed in writing Courts often rely upon the circumstantial evidence and other acceptable materials placed before them to find the rule by which the trustees hold such office. But a dichotomy is always made between the right to the office of trusteeship by succession or heirship to the last holder in juxtaposition to a right to hold it *de hors* such right to succeed to that office. In the latter case the claimant seeks for such office independently of the rule of succession or heirship. In case of succession to office by ordinary rules of heirship or as per the delineation made in the document of trust itself, if the predecessor-in-interest who was in office lost his right to the same by the force of law of limitation, then his successor-in-interest who claims through him cannot have a better right and thus the successor-in-interest in turn is disabled in law to claim and hold the office. If however the claimant rests his claim on an independent basis without reference to the rule of succession but as per the recitals in the deed or as per the custom or usage, then he has to establish it and, if successful, can be inducted into the office notwithstanding the fact that the prior office-holder lost his right by adverse possession of the same by joint or competing trustees. [*Para.* 6.]

Held, on an appreciation of the surrounding circumstances and the relative facts and materials brought on record that the female members will be entitled to hold office of trusteeship. [*Para.* 7.]

Cases referred to :

Jagathambal Anni v. *Periathambi,* (1936) 70 M.L.J. 441 : 43 L.W. 496 : A.I.R. 1936 Mad. 188 ; *K. Ramalingam Chettiar* v. *Ranganathan Chettiar,* (1973) 1 M.L.J. 288 : 86 L.W. 131 : A.I.R. 1974 Mad. 27.

Appeal against the decree of the Court of the Subordinate Judge of Tirunelveli in Original Suit No. 100 of 1968.

Sivamani and *V. Narayanaswami,* for Appellants.

R. Gopalaswamy Ayyangar and *M. Srinivasan* for Respondents.

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* Appeal No. 681 of 1970. 20*th January,* 1975.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiffs in O. S. No. 100 of 1968 on the file of the Subordinate Judge's Court, Tirunelveli are the appellants. The plaintiffs are the minor sons of the third defendant herein represented by their father and next friend. The third defendant is the daughter of the second defendant. Quite a considerable time before, one Subbaroya Chettiar endowed certain properties and created a trust called 'Subbaroya Chettiar Annathana Chatram' the purposes of which are not in dispute before us. The huqdarship or trusteeship of the above Chatram admittedly vested ever since its inception in two families commonly referred to as the Vadakku Chavadi family and the Therku Chavadi family. At or about the time when the inam settlement was effected it is claimed that one Gurunamam Chettiar on the side of the Vadakku Chavadi and Pattabiraman Chettiar on the side of the Therku Chavadi were the two trustees representing the two branches who were in charge of the Annathana Chatram. After the death of Gurunamam Chettiar on the side of the Vadakku Chavadi family, he was succeeded by Venkatasubbaroya Chettiar and thereafter by Krishnaswamy Chettiar and then by Sethuramalingam Chettiar, the father of the first defendant. After the death of Sethuramalingam Chettiar on 16th December, 1964, the first defendant is in charge of the Chatram representing the Vadakku Chavadi family. On the side of the Therku Chavadi family, as originally stated, Pattabiraman Chettiar was originally associated with Gurunamam Chettiar as the trustee. After his death, his second son Narasimhan Chettiar held the office and after him one Lakshmanan Chettiar took over on the side of the Therku Chavadi family. Lakshmanan Chettiar died on 11th December, 1937. Prior to his death and after being assured that he would not have a male child, he executed Exhibit A-11 dated 10th November, 1932 whereby he surrendered his right to hold the office of trusteeship of the Subbaroya Chettiar Annathana Chatram at Kurukkuthurai, Karuppanthurai village, Tirunelveli taluk.

Certain revealing facts are noticeable in Exhibit A-11. Lakshmanan Chettiar while executing the deed of surrender, as it is called, stated in uncanny terms that it was never the practice for a female member on either side of the two families to hold office of trusteeship and that was the manner and mode in which the office of trusteeship was held ever since it was dedicated by Subbaroya Chettiar and as there were no male heirs who could take over the administration and hold office as co-trustees with the member representing the Vadakku Chavadi family, Lakshmanan Chettiar executed the deed of surrender whereby he surrendered his right to hold office for ever in favour of the then co-trustee Sethuramalingam Chettiar who was representing the Vadakku Chavadi line. The plaintiff's claim however is that the said Lakshmanan Chettiar had no right to effectuate such a surrender and give up the right to hold office of trusteeship on the Therku Chavadi line and thus ignoring the said surrender deed, Exhibit A-11, the plaintiffs would contend that Lakshmanan Chettiar could not give up the right of trusteeship which belongs to the Therku Chavadi family and therefore as heirs of Lakshmanan Chettiar, to wit, as the daughter's sons, they would be entitled to hold office of trusteeship jointly along with the first defendant representing the Vadakku Chavadi line and that in order to accelerate the right of the plaintiffs to seek for and hold such office of trusteeship, the second defendant (their mother) had surrendered her right in favour of her daughter the third defendant and the third defendant in turn had surrendered her rights to these plaintiffs on 24th December, 1966 and that the plaintiff's are therefore entitled to be the joint huqdars of the Ananthana Chatram along with the first defendant who by then became the sole trustee in consequence of the deed of surrender, Exhibit A-11, dated 10th November, 1932 and as heir of Sethuramalingam Chettiar. The plaintiffs therefore came to Court for a declaration that they are entitled to be joint huqdars with the first defendant in relation to the trust called Subbaroya Chettiar Annathana Chatram and prayed for consequential reliefs.

2. The first defendant in his written statement pleaded that the plaintiffs have no right at all to lay the present action and that the suit claim is barred by time. Relying upon the deed of surrender or settlement, Exhibit A-11 dated 10th November, 1932, the first defendant would claim that the Therku Chavadi branch relinquished their right to hold office of trusteeship and that it was done in the best interests of the management of the trust and as such a situation was inescapable since no female member could ever be in management of the trust in accordance with the usage and custom prevailing in the matter of the governance of the charity. The first defendant specifically pleaded that in any event his father Sethuramalingam Chettiar and thereafter himself were exclusively, continuously and publicly, to the knowledge of the second and third defendants and the plaintiffs, were advesely in possession of the office and therefore the present claim of the plaintiffs is barred by limitation. No doubt the second and third defendants sail along with the plaintiffs and would admit their claim.

3. On the above pleadings, the following issues were framed :

1. Whether the relationship of the persons mentioned in the plaint is true and correct ?

2. Whether the 2nd defendant acted as joint trustee with 1st defendant's father Sethuramalingam Chettiar at any time ?

3. Whether the surrender by defendants 2 and 3 to plaintiffs alleged in the plaint is true and valid ?

4. Whether the plaintiffs have any present cause of action for filing this suit?

5. Whether the suit is barred by time ?

6. Whether the suit trust has been always managed by the rule of primogeniture by usage and custom as contended by the first defendant ?

7. To what reliefs, are the plaintiffs entitled ?

4. The learned trial Judge held that the suit trust was not managed by the rule of primogeniture either by usage and custom as contended by the first defendant but on issues 2 to 4 he was of the view that the second defendant did not act as joint trustee with Sethuramalingam Chettiar at any time and that the surrender said to have been made of the rights of defendants 2 and 3 in favour of the plaintiffs as alleged in the plaint is not true and that the plaintiffs had no present cause of action to file the suit. On the issue, whether the suit is barred by time he held that it was so and against the plaintiffs. In the result the suit was dismissed. It is as against this the plaintiffs have filed the present appeal.

5. The main contention raised by Mr. Sivamani, learned counsel for the appellants is that on an overall appreciation of the evidence let in by the plaintiffs it would not be difficult to say that even the females were entitled to the office of trusteeship and thus viewed, the surrender or relinquishment of the office on the ground that no female member of either of the families could ever hold the office of trusteeship and that in consequence Lakshmanan Chettiar's surrendering the rights of the Therku Chavadi family in favour of the Vedakku Chavadi family is an instrument which cannot create rights and cannot simultaneously also dives rights. It is also said that Lakshmanan Chettiar had no right to surrender *in future* such huq or right which might crop up in the family of the Therku Chavadi and therefore it is contended that defendants 2 and 3 as the daughter and grand-daughter of Lakshmanan Chettiar still retained their right to hold office either for themselves or to their nominees and that they having surrendered their rights in favour of the plaintiffs, though minors, the plaintiffs' action is sustainable and within the compass of propriety. The second contention is that the plaintiffs in the alternative were claiming the right to hold office in their own independent right and not necessarily through the channel of succession as members of the Therku Chavadi family and that therefore the suit is not barred by limitation.

6. In cases of private trusts, the modes by which trustees are ordained to hold their office as such is generally set out in the recitals of the relative trust deed itself. In the absence of any such deed in writing Courts often rely upon the circumstantial evidence and the other acceptable mate-

rial placed before them to find the rule by which the trustee holds such office in relation to private trusts. But a dichotomy is always made between right to the office of trusteeship by succession or heirship to the last holder in juxtaposition to a right to hold it *de hors* such right to succeed to that office. In the latter case the claimant seeks for such office independently of the rule of succession or heirship. In the case of succession to office by the ordinary rules of heirship or as per the delineation made in the document of trust itself, if the predecessor-in-interest who was in office lost his right to the same by the force of law of limitation, then his successor-in-interest who claims through him cannot have a better right and thus the successor-in-interest would in turn by disabled in law to claim and hold the office. If, however, the claimant rests his claim to an office of trusteeship on an independent basis without reference to the rule of succession but as per the recitals in the deed or as per the custom or usage, then he has to establish it and if successful can be inducted into the office notwithstanding the fact that the prior office-holder lost his right by adverse possession of the same by the joint or competing trustee. These two propositions are by now well settled as is seen from *Jagathambal Anni* v. *Periathambi*[1], where the learned Judges said that whatever the difference may have been as to the time when the possession becomes adverse, there has latterly been no doubt whatever that once adverse possession starts, it operates not merely against the then trustee, but against his successors as well and this can only be on the footing that each succeeding trustee claims under his predecessor. Expatiating this passage, Palaniswamy, J. In *K. Ramalingam Chettiar* v. *Ranganathan Chettiar*[2], observed for the Bench as follows :—

"Adverse possession against one to the office of trusteeship would not operate against another if the other person does not claim through the person whose right is lost by limitation. If the succeeding trustee claims title independently of the person whose right is lost by limitation, the aforesaid principle is not applicable."

7. Bearing these essential principles of law in mind, we shall now consider the contentions of the learned counsel for the appellants. It is said that there is no exclusion of female members of either of the families from holding office of trusteeship of this Annathana Chatram. Reliance is placed upon Exhibit A-4 dated 2nd August, 1881, which was an order made by the Depurty Collector, Tirunelveli, who, under circumstances not clearly known, recognised the daughter of Pattabhirama Chettiar as one of the co-trustees to be in management of the Chatram. The recital, however is, "*தாசில்தார் சிபார்சுபடி இறந்து போனவனுக்கு பதிலாக அவர் மக்களை அக்குதாருக சேர்த்துக்கொள்ளவும்.*" "It is very doubtful whether the expression "*மக்களை*" appearing in Exhibit A-4 would refer to "*மகளை*". Certainly it would include "*மகள்*" but it would not necessarily mean that it was only the female member which was in the contemplation of the Deputy Collector when he made the order under Exhibit A-4. But this circumstance which has not got the weight which would be required for acceptance by us is outweighed by a later document Exhibit A-11 which is a registered instrument executed by Lakshmanan Chettiar in favour of Sethuramalingam Chettiar on 10th November, 1932. We have already summarised the essentials of this instrument in our preface. Lakshmanan Chettiar was conscious of the fact that ever since the properties were dedicated for the purpose of charity by Subbaroya Chettiar it was never in the contemplation of parties that a female from either side of the families namely the Vadakku Chavadi or the Therku Chavadi, should ever be inducted as a joint trustee to manage the affairs of the chatram. A conscious recital to this effect by a member of the Therku Chavadi family as early as 1932 cannot be lightly ignored. This speaks of the usage and custom by which the trusteeship the Chatram was being regulated. At any rate we are of the view that Exhibit A-11 being an ancient document within the

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1. (1936) 70 M.L.J. 441 : 43 L.W. 496: A.I.R. 1936 Mad. 188.

2. (1973) 1 M.L.J. 288 : 86 L.W. 131 : A.I.R. 1974 Mad. 27.

meaning of the provisions of the Evidence Act and having regard to the subsequent conduct of the second and the third defendants after such relinquishment of office by Lakshmanan Chettiar the contention of Mr. Sivamani that female members of either of the families could also hold office as trustees appears to be untenable. We have already referred to the fact that there is no instrument which has been placed before us which governs the governance of the trust. We are therefore left with the appreciation of the surrounding circumstances and the relative facts and materials brought on record to reasonably infer as to what ought to be the mode and manner of succession to the office of trusteeship to this Chatram. On a perusal of Exhibit A-11 it does not appear to us that there was any design or motive on the part of Lakshmanan Chettiar when he caused such a relinquishment to be made of the office of trusteeship from the family of Therku Chavadi to and in favour of a representative of the Vadakku Chavadi family. Such being the real purport of Exhibit A-11, we cannot lightly discountenance the contention of the learned counsel for the respondents that ever since the dedication of the properties for purposes of the charity in question by Subbaroya Chettiar it was always intended that the male members from either of the families should constitute the Board of Management to be in charge of the administration of the trust. We are therefore unable to agree with the first contention that even female members are entitled to hold office. . . .

8. The next ancillary question which arises is whether the theory of surrender said to have been made by the second and the third defendant in favour of the plaintiffs could be true. Here again there is a bundle of controversy. Whilst in the pleadings the plaintiffs would rest their case on an oral surrender said to have been made by the second and the third defendants in or about 25th December, 1966, in the course of the trial they would rely upon Exhibit A-1 dated 9th October, 1969, which is a registered release deed executed by defendants 2 and 3 in favour of the plaintiffs but long after the institution of the suit. Rightly therefore, the Court below rejected Exhibit A-1 as being *post litem* and found that there was no case of oral surrender made out with reference to acceptable evidence. We agree with the said finding and hold that there was no such surrender of the so-called right of defendants 2 and 3 in favour of the plaintiffs.

9. The other question is whether plaintiffs could project an independent title to the office *de hors* the rule of succession impliedly mooted out by the first defendant based on Exhibit A-11 and the surrounding circumstances. The appellant's case is that they being the daughters' sons of Lakshmanan Chettiar are in any event to be recognised as male persons entitled to succeed as joint huqdars to be in management of the charity in question and that therefore the first defendant has no right to exclude the plaintiffs from such co-ordination. Here again the appellants' argument is fallacious. We have already held that under Exhibit A-11 there has been a snapping of the huqdarship in the matter of succession to the office of trusteeship by Lakshmanan Chettiar absolutely relinquishing the right to hold such office because of the absence of male heirs to him. After such snapping, the first defendant's predecessor-in-interest Sethuramalingam Chettiar was solely in management of the trust publicly and to the knowledge of all including Lakshmanan Chettiar and his heirs. It is but reasonble to assume that defendants 2 and 3 as the wife and daughter of Lakshmanan Chettiar knew about such exercise of the right to hold office on the part of the first defendant and his predecessor-in-interest ever since 10th November, 1932. It is common ground that neither the second defendant nor the third defendant at any time prior to the action objected to or interfered with the sole and exclusive management of the trust properties by the first defendant. In those circumstances, the first defendant or his father were adversely in possession of the office to the knowledge of those who should, if possible put forward such a claim to it. The second defendant, not having questioned such a state of affairs for a considerable length of time, is estopped from vesting in herself the so-called right to hold office of trusteeship and to surrender such a right, even if it is true in favour of her grandsons

when an inconvenient situation arose for her to do so. It is established law that once a right is lost by the operation of the rule as to limitation, then it cannot be revived unless under certain extraordinary circumstances, since there is an extinction of that right by the operation of law. Once therefore the second defendant and equally the third defendant lost their respective rights, even if they could claim as female members of the Therku Chavadi family, they cannot by a voluntary act of theirs create such rights in themselves and surrender such self-imposed rights either orally or in writing as they purported to do under Exhibit A-1. We are therefore of the view that the so-called surrender, whether it is oral or as evidenced by Exhibit A-1, has no legal force at all. This is so because the second defendant has lost her right to hold the office under Article 107 of the Limitation Act which says that a person competing for possession of a hereditary office should file the suit within 12 years from the date when the other person takes possession of the office adversely to him. As stated already by us, for a period of 12 years and more, neither the second defendant nor the third defendant did raise any protest against the exclusive management of the trust by the first defendant. As a matter of fact under Exhibit A-10 dated 16th January, 1947, a member of the public brought to the notice of the second defendant that it was imperative on her part to resume the management of the trust as she was entitled to a joint right of trusteeship and management of the Annathana Chatram. Even this would not provoke the second defendant or even the third defendant to take such action as was necessary in law to assert their claims which by then were prejudicially being held and exercised by the first defendant. We are therefore satisfied that the suit brought in by the plaintiffs as the daughter's sons of Lakshmanan Chettiar on 22nd July, 1968 is hopelessly barred by limitation. Thus viewed, the plaintiffs had no cause of action at all to initiate the proceedings.

10. All the contentions of the learned counsel for the appellants therefore fail and the appeal is dismissed. There will be no costs in this appeal.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ. and S. Natarajan, J.*

Haridas Girdharidas and others .. *Plaintiffs**

v.

M. Varadaraja Pillai and another .. *Defendants.*

and

M. Varadaraja Pillai .. *Applicant*

v.

Haridas Girdharidas and others .. *Respondents.*

(A) *Madras City Tenant's Protection Act* 1921 (*III of* 1922) *as amended by Madras Acts XIX of* 1955, *IV of* 1972 *and XXIV of* 1973—*Scope and applicability.*

By a registered deed of lease dated 17th November, 1938 a landlord had leased out a certain plot of land within the City of Madras to one V for a period of fifteen years and three months on a rent of Rs. 560 per month with an option for renewal for a further period of ten years but at an enhanced rent of Rs. 630 per month. Under the terms of the lease the tenant put up a theatre on the demised land at a cost of more than Rs 50,000 for exhibition of cinema films. At the expiration of the lease period the lessor exercised his option of purchasing the buildings and sent the lessee a sum of Rs. 50,000 as agreed upon. The lessee declined to accept it, denying any right in the landlord to enforce the option. Thereafter the landlord brought a suit (C.S. No. 28 of 1964) on the Original Side of the High Court for a declaration that he was the owner of the superstructure as from 1st March, 1964 and for rents etc. The suit was dismissed on the view that the landlord was not entitled to invoke the proviso to section 12 of the Madras City Tenants Protection Act. An appeal preferred by the landlord was also dismissed. A further appeal to the Supreme Court (C.A. No. 74 of 1971) proved successful. The Supreme Court granted the declaration and, allowing an amendment of the plaint, directed the tenant to

* C.S. No. 28 of 1964 and Application Nos. 2525 and 2526 of 1973, etc. *3rd July,* 1975.

deliver possession to the landlord of the demised land and buildings and the superstructure and mesne profits to be determined by the Trial Court from 4th August, 1968 till delivery. Possession was directed to be delivered within six months from 18th August, 1971, the date on which the Supreme Court allowed the appeal.

Act IV of 1972 amending the Madras City Tenants Protection Act came into force from 9th February, 1972. In view of the Amending Act, the tenant made an application for a direction to the landlord to sell the land to him. Along with it another application was filed by the tenant to dispose of the application which was pending all the time before and after the judgment of the Supreme Court, to direct a sale of the land to him. On 13th October, 1972 a Division Bench of the High Court dismissed the applications (See 86 L.W. 156). The tenant preferred appeals to the Supreme Court by Special Leave against those orders. Pending the appeals, the Supreme Court granted stay of execution of its decree for possession on an undertaking given by the tenant that he would vacate and deliver possession within three months of the disposal of the appeals. While the appeals were pending the tenant sought a review from the Supreme Court of its earlier judgment and decree. The review petition was dismissed on merits on 12th March, 1973. Another Act XXIV of 1973 amending the City Tenants Protection Act came into operation on 27th July, 1973. Taking advantage of this Act the tenant filed another review petition in the Supreme Court. This petition also was dismissed as withdrawn on 30th August, 1973. Thereafter on 10th September, 1973, the tenant filed an application on the Original Side of the High Court to reopen and review the Judgment and decree in the suit as reversed and modified by the Supreme Court in the appeal filed by the landlord on 27th September, 1973. The appeals by Special Leave filed against the orders of the Division Bench were withdrawn and they were dismissed by the Supreme Court. The tenant delivered possession of the demised land and building to the landlord on 24th March, 1974 as per the undertaking given by him in a contempt application taken out against him on 5th March, 1974. On 21st May, 1974, the tenant died and on 26th August, 1974, an application was taken out by the landlord to dismiss the tenant's application filed on 10th September, 1973 as having abated on the death of the tenant.

The tenant's application had sought a direction to the landlord to sell the property to him for a price to be fixed by the Court either on the ground that in view of Madras Act IV of 1972, the Judgment of the Supreme Court in *H. Girdharidas* v. *V. Pillai*, (1972) 1 S.C.R. 291: (1973) 2 S.C.J. 484 : A.I.R. 1971 S. C. 2366, was null and void or on reopening of the review of that judgment in terms of section 9 (3-A) of Madras Act XXIV of 1973.

Held:—The principle that once the tenant had delivered possession of the demised land and building to the landlord there is an end of the tenancy and the tenant ceased to have that character any more, is with better force applicable to the extended definition of a tenant under the Amending Act XXIV of 1973. In the absence of actual ownership, that is to say, the land owned by the landlord and the building thereon owned by the tenant, there is hardly any room for the applicant to invoke the Madras City Tenants Protection Act as amended by the three Amending Acts. [*Paras.* 8 *and* 12.]

(B) *Civil Procedure Code* (*V of* 1908), *sections* 37 *and* 114—*Order XLVII, rule* 1—*Review*.

The expression "the Court which passed the decree" means under section 37 of the Code of Civil Procedure the Court of the first instance, but it is only for the purpose of execution of the decree or order. There is nothing in section 9 (3-A) of the Madras City Tenant's Protection Act as amended to suggest that the expression "the Court which passed the decree" therein means the Court of first instance. The order passed by the Supreme Court cannot be reviewed or reopened by the High Court. [*Para.* 12.]

Cases referred to :—

M. Varadaraja Pillai v. *Haridas Girdharidas*, (1973) 86 L.W. 156 ; *H. Girdharidas* v. *V. Pillai*, (1973) 2 S.C.J. 484: A.I.R.

1971 S.C. 2366; *Ramsden* v. *Dyson*, (1866) L.R. 1 H.L. 129; *Forbes* v. *Ralli*, 49 M.L.J. 48: 8 I.C. 318: 52 I.A. 178: A.I.R. 1925 P.C. 146; *Union of India* v. *Indo-Afghan Agencies*, (1968) 2 S.C.J. 889: (1968) 2 S.C.R. 366: A.I.R. 1968 S.C. 718; *Piare Dusadh* v. *Emperor*, (1944) F.C.R. 61: (1944) 1 M.L.J. 305: A.I.R. 1944 F.C.1; *Subbayya* v. *Bhushan Rao*, A.I.R. 1941 Mad. 817; *R.L. Arora* v. *State of Uttar Pradesh*, (1964) 2 S.C.J. 652: (1964) 2 M.L.J. (S.C.) 148: (1964) 2 An.W.R. (S.C.) 148: (1964) 2 Com. L.J. 309: A.I.R. 1964 S.C. 1230; *Tirath Ram v. State of U. P.*, (1974) 2 S.C.J. 180: A.I.R. 1973 S.C. 405; *Ahmedabad Corporation* v. *New S.S. and Weaving Company*, (1971) 1 S.C.J. 446: (1971) 1 S.C.R. 268: A.I.R. 1970 S.C. 1292; *Janapada Sabha* v. *Chindwara, etc.*, (1970) 2 S.C.J. 454: (1970) 3 S.C.R. 745: A.I.R. 1971 S.C. 57.

V. K. T. Chari for *L. V. Krishnaswami Iyer, Janaki Krishnan* and *L. K. Sankaran*, for Plaintiffs.

M. K. Nambiar for *K. Parasaran* and *S. Jagadisan*, for 1st defendant.

The Additional Government Pleader, for 2nd defendant.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This is a prolonged litigation involving landlord and tenant and the provisions of the Madras City Tenants Protection Act, 1921 (III of 1922) as amended by Madras Acts XIX of 1955, IV of 1972 and XXIV of 1973. The tenant, one Varadaraja Pillai, who having died on 21st May, 1974 and is now represented by his heirs, asks in his applications for a direction to the landlord to sell to him the land covered by the lease for a price to be fixed either on the ground that in view of Madras Act IV of 1972, the Judgment in *H. Girdharidas* v. *V. Pillai*[1], is null and void or on reopening of review of that Judgment in terms of section 9 (3-A) of Madras Act XXIV of 1973. The appellants there had by a registered lease deed dated 17th November, 1938 leased out to the tenant a certain plot of land for a period of fifteen years and three months on a rent of Rs. 560 per month with an option for renewal for a further term of ten years but at the enhanced rent of Rs. 630 per month. Under the terms of the lease the tenant constructed a theatre on the land at a cost of more than Rs.50,000 for exhibition of cinema films. At the expiration of the lease period, the lessor exercised the option of purchasing the buildings and sent the lessee a sum of Rs. 50,000 as agreed upon in the lease deed without deducting depreciation. But the lessee declined to accept it taking up the stand that the landlord had no right to enforce the stipulation in the lease deed providing for the landlord's option to purchase the building. Thereafter the landlord brought a suit for a declaration that the landlord was the owner of the superstructure from 1st March, 1964 and for rents etc., The suit was dismissed on the view that the landlord was not entitled to invoke the proviso to section 12. With this conclusion, a Division Bench of this Court to which one of us was a party, concurred and dismissed the landlord's appeal. A further appeal by the landlord to the Supreme Court was however successful. It not only granted the declaration asked for by the landlord, but also on allowing an amendment of the plaint, directed the tenant to deliver possession to the landlord of the demised land and buildings and superstructures built thereon in good and satisfactory condition and granted mesne profits to be determined by the trial Court from 4th August, 1968 till delivery. Possession was directed to be delivered within 6 months from 18th August, 1971, the date on which the Supreme Court allowed the appeal.

2. We may mention that though the Madras City Tenants Protection Act, 1921 applied only to tenancies prior to 21st February, 1922, the Madras Amending Act XIX of 1955 extended its benefits to the tenancies prior to 12th September, 1955. The preamble to the Act, as it originally stood, stated its object as that it was necessary to give protection to tenants, who in municipal towns and adjoining areas in the State of Madras had constructed buildings on others' lands in the hope that they

1. (1972) 1 S.C.R. 291: (1973) 2 M.L.J. (S.C.) 45: (1973) 2 S.C.J. 484: (1973) 2 An.W.R. (S.C.) 45: A.I.R. 1971 S.C. 2366.

would not be evicted so long as they paid a fair rent for the land. By section 3 every tenant shall on ejectment be entitled to be paid as compensation the value of any building erected by him. The quantum of compensation to be paid by the landlord succeeding in the ejectment suit is to be determined by the Court and on payment thereof by the landlord into Court within the time statutorily allowed, the tenant shall put him into possession of the land with the building. If the amount is not so paid, the landlord shall not be entitled to institute a fresh suit for ejectment, or present a fresh application for recovery of possession for a period of five years. By section 9 (1) any tenant entitled to compensation under section 3 and against whom a suit in ejectment has been instituted may within the prescribed time apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of the extent of land mentioned in his application. The Court may then determine the extent of land to be sold by the landlord and the price therefor. If the price is paid by the tenant, the Court shall pass the order directing a conveyance by the landlord to the tenant of the extent of land for which the price was fixed. The Court may further direct that the tenant should put the landlord into possession of the remaining extent of land if any. Section 12, which is the same except for the proviso, says that nothing in any contract made by a tenant shall take away or limit his rights under the Act. In order to give effect to these special provisions, section 13 places restriction on the application of the Transfer of Property Act, 1882. The Amending Act IV of 1972 substituted the preamble by a new one, namely :

> " Whereas it is necessary to give protection against eviction to tenants, who in municipal towns and adjoining areas in the State of Tamil Nadu have constructed buildings on others' lands, so long as they pay a fair rent for the land."

By section 3, the proviso to section 12 has been omitted and it shall be and shall be deemed always to have been omitted. Then we have section 4 ;

> " Notwithstanding anything contained in any judgment, decree or order of any Court or other authority to the contrary, any stipulations made by a tenant in writing registered as to the erection of buildings in so far as they relate to buildings erected after the date of the contract shall, to the extent such stipulations take away or limit his rights under the Principal Act as amended by this Act, be and shall be deemed always to have been null and void and accordingly the tenant shall be and shall be deemed always to have been, entitled to the rights under the principal Act as amended by this Act."

The next section in the Amending Act is to the effect that sections 3 and 4 therein shall not apply to any case where the landlord has before the date of the commencement of the Amending Act taken possession of the land and building from the tenant. The Amending Act came into force from 9th February, 1972, it having received the assent of the President on that date.

3. In view of this Amending Act, the tenant made Application No. 437 of 1972 for a direction to the landlord to sell the land to him. Along with it was another application filed by the tenant to dispose of Application No. VII of 1965 which was pending all the time before and after the judgment of the Supreme Court to direct a sale of the land to him. On 13th October, 1972, Ismail and Palaniswamy, JJ., dismissed this application, vide *M. Varadaraja Pillai* v. *Haridas Girdharidas*[1]. The learned Judges were of opinion that section 4 of Madras Act IV of 1972 neither expressly nor by necessary implication authorised re-opening or review of any final judgment, decree or order of any Court competently made by it in the proceedings validly instituted before it and that in the absence of any such provision in the Amending Act of 1972, they were unable to accept the contention of the tenant that the Act authorised him to file the application. The tenant preferred appeals to the Supreme Court by Special Leave against those orders. Pending the appeals, the Supreme Court granted stay

1. (1973) 86 L.W. 156.

of execution of its decree for possession on the undertaking by the tenant that he would vacate and deliver possession within three months of the disposal of the appeals. While the appeals were still pending, the tenant sought a review from the Supreme Court of its earlier judgment and decree. But this review petition was dismissed on merits on 12th March, 1973. On 27th July, 1973 came into operation the Amending Act XXIV of 1973. This Act made important provisions enlarging the definition of tenant, giving him a fresh right to apply for an order against the landlord to sell the land for a price to be fixed by the Court and on an application of the tenant enabling the Court which passed the decree or order against him to review or reopen its earlier judgment. Section 2 expanded the definition of a tenant by adding the following clause :

"(ii) includes—

(*a*) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement.

(*b*) Any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub-section (3) of section 1 and who or any of whose predecessors in interest had erected any building on such land and who continues in actual physical possession of such land and building, notwithstanding that—

(1) such person was not entitled to the rights under this Act by reason of the proviso to section 12 of this Act as it stood, before the date of the publication of the Madras City Tenants Protection (Amendment) Act, 1972 (Tamil Nadu Act IV of 1972) or

(2) a decree for a declaration or a decree or an order for possession or for similar relief has been passed against such person or the ground that the proviso to section 12 of this Act as it stood before the date of the publication of the Madras City Tenant's Protection (Amendment) Act, 1972 (Tamil Nadu Act IV of 1972) disentitled such person from claiming the rights under this Act, and

(*c*) the heirs of any such person as is referred to in sub-clause (i) or sub-clause (ii) (*a*) or (ii) (*b*) ;

but does not include a sub-tenant or his heirs ".

Section 3 of the Amending Act is as follows :-

"In section 9 of the Principal Act—(*i*) clause (*a*) of sub-section (1) shall be renumbered as item (i) of that clause and after that item as so renumbered, the following item shall be inserted, namely (ii) Notwithstanding anything contained in clause (*a*) (i) of this sub-section, any such tenant as is referred to in sub-clause (*ii*) (*b*) of clause (4) of section 2 or his heirs, may within a period of two months from the date of the publication of the Madras City Tenant's Protection (Amendment) Act, 1973 apply to the Court (whether or not a suit for ejectment has been instituted or proceeding under section 41 of the Presidency Small Causes Courts Act, 1882 (Central Act XV of 1882) has been taken by the landlord or whether or not such suit or proceeding is pending) having jurisdiction to entertain a suit for ejectment or in the City of Madras either to such Court or to the Presidency Small Cause Court, for an order that the landlord under the tenancy agreement shall be directed to sell for a price to be fixed by the Court the whole or part of the extent of land specified in the application."

(*ii*) after sub-section (3), the following sub-section shall be added, namely :—

(3-A) Notwithstanding anything contained in clause (*b*) of sub-section (3) of this section or in section 5 of the Madras City Tenants Protection (Amendment) Act in 1972 (Tamil Nadu Act IV of 1972), or any other law for the time being in force, the Court which passed the decree or order referred to in sub-clause (ii) (*b*) (2) of clause (4) of section 2 shall, on application made by the tenant referred to in that sub-clause within a period of two months from the date of the publication of the Madras City Tenants' Protection (Amendment) Act, 1973 reopen or review the proceedings relating to such decree or order and

may pass a decree or an order that the tenant referred to in the said sub-clause is entitled to the rights under this Act and pass such other supplemental, incidental or consequential orders as are necessary for the purpose as if the Madras City Tenants Protection (Amendment) Act, 1973, were in force at the time at which the decree or order was passed."

4. The next section substituted the heading of section 4 in the 1972 Act by "certain stipulations to be and to be deemed to have been *null and void*." In section 5 of the 1972 Act, at the commencement, the following expression shall be inserted namely :

"Subject to the provisions of sub-section (3-A) of section 9 of the Principal Act, as amended by the Madras City Tenants Protection (Amendment) Act, 1973."

By section 4 of the 1973 Act, the words, 'taken possession' in section 5 of the 1972 Act were substituted by the words "been delivered actual physical possession". Evidently taking advantage of the amending Act of 1973, the tenant filed Review Petition No. 28 of 1973 in C.A. No. 74 of 1971 on the file of the Supreme Court. By this petition the tenant asked the Supreme Court to reopen and review the Judgment and decree in *H. Girdharidas* v. *V. Pillai*[1], and pass a decree that the petitioner was entitled to the rights and benefits under the Madras City Tenants Protection Act III of 1922, as amended by Madras Acts XIX of 1955, IV of 1972 and XXIV of 1973 and make all necessary orders and directions giving him all the rights under the said Act to which he was entitled and to direct the landlord to sell the land to him for a price to be fixed by the Court. But this petition was dismissed as withdrawn on 30th August, 1973. Thereafter on 10th September, 1973 the tenant filed Application No. 2525 of 1973 in C.S.No. 28 of 1964 on the Original Side of this Court to reopen and review the judgment and decree in that suit as reversed and modified by the Supreme Court in *H. Girdharidas* v. *V. Pillai*[1] and pass a decree that he was entitled to the rights and benefits under the Madras City Tenants Protection Acts of 1922 as amended by Acts of 1955, 1972 and 1973 and to make all necessary orders and directions giving him all the rights to which he was entitled under section 9 (3-A). This is the main application with which we are concerned at the moment. To complete the narration, on 27th September, 1973, the appeals arising from *M. Varadaraja Pillai* v. *Haridas Girdharidas*[1], were withdrawn and they were dismissed by the Supreme Court. On 5th March, 1974 in a contempt application in the Supreme Court taken out on behalf of the landlord against the tenant, the Supreme Court passed the following order :

"Mr. Setalvad on behalf of his clients (tenant) gives an unconditional undertaking that possession will be handed over in compliance with the undertaking dated the 10th January, 1974 within three weeks from today. After compliance with the undertaking dated 10th January, 1974, if Mr. Setalvad's clients wish to seek proceedings in the appropriate Court with regard to his rights of possession to the premises he will do so on notice to Mr. Sorabjee's clients and will obtain directions in that behalf from the appropriate Court.

Mr. Setalvad says that applications are pending in Court at Madras. We do not express any opinion on that.

This C.M.P. will be kept pending and be listed for hearing before this Bench four weeks from today."

In view of this order of the Supreme Court, the tenant delivered possession of the demised land and buildings to the landlord on 24th March, 1974. On 21st May, 1974, the tenant Varadaraja Pillai died and on 26th August, 1974. Application No. 2698 of 1974 was taken out by the landlord to dismiss Application No. 2526 of 1973 which is for direction for sale of the land, as having abated on the death of Varadaraja Pillai.

1. (1973) 2 S.C.J. 484 : A.I.R. 1971 S.C. 2366

1. (1973) 86 L.W. 156.

5. Before we proceed further, let us see the effect of the three Amending Acts. As the Act originally stood, it applied to tenancies of lands in the City of Madras brought into existence prior to 21st February, 1922. By reason of the Amending Act XIX of 1955, the application of the Act was extended to tenancies in existence prior to 12th September, 1955. It is not necessary for purposes of this case to see how the preamble in its unamended form could justify such extended application because subsequent to 11th February, 1922 no tenant would have entertained the hope in constructing buildings on demised land that he would not be evicted therefrom, nor could he have expected while building on the land, such an Amending Act. The rule in England has been that when a person built upon another's land, the building became part of the land and went along with it, but in India, that is not the rule. Section 108 of the Transfer of Property Act, which regulates the rights and liabilities of the lessor and the lessee, provides by clause 108 (*h*) that the lessee may even after the determination of the lease, remove at any time whilst he is in possession of the demised property but not afterwards, all things which he has attached to the earth, provided he leaves the property in the state in which he received it. The lessee in such a case cannot justifiably claim compensation for the building when he surrenders possession of the land. In England, the rule of estoppel by equity was developed from *Ramsden* v. *Dyson*[1], in which Lord Kingsdown observed:

> "The rule of alw applicable to the case appears to me to be this : If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord, and without objection by him lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

1. (1866) L.R. 1 H.L. 129.

The Privy Council in *Forbes* v. *Ralli*[1], applied this principle to India. The landlord who let out the land, having represented that the tenancy was a permanent one and the tenant having acted on that representation and put up constructions, it was held at page 149:

> "Estoppel prevents the Plaintiff (landlord) from evicting from their holding the defendants whom he the Plaintiff induced by his representation and conduct to believe that they had a fixity of tenure although not of rent, in the lands that had been leased to them."

We may also mention that the principle of *Ramsden* v. *Dyson*[2], has since been approved by the Supreme Court in *Union of India* v. *Indo-Afghan Agencies*[3]. The preamble to the Act was then based on this equitable principle which is given effect to by its provisions. By section 3 a tenant on ejectment will be entitled to be paid the value of the building he has constructed as compensation and the tenant on payment of such compensation by the landlord, shall put him into possession of the land with the building. Alternatively the tenant who is entitled to compensation under section 3 and against whom a suit or proceeding in ejectment has been instituted, may apply to the Court for a direction to the landlord to sell to him the land for a price to be fixed by it. Section 12 enjoined that nothing in any contract made by a tenant shall take away or limit his rights under the Act. The rights under the Act are those just mentioned, namely for the tenant to get compensation for the building in a suit for his ejectment or his right for a direction to the landlord to sell, the land to him for a price to be fixed by the Court. The proviso to this section ran thus :

> "Provided that nothing herein contained shall affect any stipulations made by

1. 49 M.L.J. 48 : 87 I.C. 318 : 52 I.A. 178 : A.I.R. 1925 P.C. 146.
2. (1866) L.R. 1 H.L. 129.
3. (1968) 2 S.C.J. 889 : (1968) 2 S.C.R. 366 : A.I.R. 1968 S.C. 718.

the tenant in writing registered as to the erection of buildings in so far as they relate to buildings erected after the date of the contract."

In passing, we may mention that decisions were not uniform as to the scope and effect of this proviso. The Supreme Court has however in *H. Girdharidas* v. *V. Pillai*[1], as between the parties to this case, held, that the proviso to section 12 covers the stipulation in the lease deed dated 17th November, 1938 which we have already referred to. The Amending Act IV of 1972 by the substitution of a new preamble dropped the word 'hope' and purported to give protection against eviction to tenants who in municipal towns and adjoining areas in this State have constructed buildings on others' lands so long as they pay a fair rent for the land. This substitution takes effect retrospectively as if that was the one always in existence. Section 3 of the Amending Act dropped the proviso to section 12 of the main Act with similar retrospective effect. We have already set out section 4 of the Amending Act. Its effect is to render *ab initio* null and void stipulations in tenancy agreements taking away or limiting the tenant's rights under the principal Act as modified by the 1972 Act. The opening *non-obstante* clause in this section is claimed to nullify the Judgement in *H. Girdharidas* v. *V. Pillai*[1]. But we shall deal with this matter presently. It is noteworthy that sections 3 and 4 of this Amending Act shall not apply to any case where the landlord has taken possession of the land and building from the tenant before the commencement of the Act.

6. The next Amending Act of 1973 enlarged the definition of a tenant so as to take within its ambit a person who was a tenant who had erected any building on the demised land and continued in actual possession of the land and building, notwithstanding that he, by reason of the proviso to section 12 before its repeal would not have been entitled to the rights under the Act, or that there is a decree or order for declaration or for possession, or similar relief based on the said proviso before its repeal. Such a tenant will also include his heirs. Such a tenant has been given by section 3 a fresh right to apply within the time specified to the Court having jurisdiction for a direction to the landlord to sell the land to him for a price to be fixed by the Court and such a remedy is available to him irrespective of whether or not, a suit or a proceeding for ejectment has been instituted. Section 3 of the Amending Act of 1973 also by introducing a new sub-section (3-A) to section 9 gives a further right to the tenant to apply to the Court which passed the decree or order against him based on the proviso to section (12) to have it reopened or reviewed and ask for an order that he is entitled to the rights under the Act and consequential directions necessary as if the Amending Act was in force at the time at which such decree or order was passed. One more thing the Amending Act of 1973, did was to provide that sections 3 and 4 of the Amending Act of 1972 shall not apply to any case only where the landlord had before the date of the commencement of that Act been delivered actual physical possession of the land and building by the tenant.

7. According to Mr. M.K. Nambiyar for the tenant, as a result of the last two Amending Acts, the Judgment in *H. Girdharidas* v. *V. Pillai*[1], has been rendered null and void, along with the stipulations relating to the building in the lease deed and is out of the way of giving direction to the landlord to sell the land to the tenant, that the tenant has been conferred a right to apply for such a direction, which he has done now, and that, in any case, the tenant is entitled to have the Judgment of the Supreme Court in *H. Girdharidas* v. *V. Pillai*[1], reopened or reviewed and to have suitable orders made for sale of the land to him. After a careful consideration of these submissions of Mr. Nambiyar, we are unable to agree with him for reasons which will appear presently.

8. Firstly, when on 24th March, 1974, Varadaraja Pillai delivered to the landlord physical possession of the land and building covered by the tenancy, he would have ceased to be a tenant even within the

1. (1973) 2 S.C.J. 484 : A.I.R. 1971 S.C. 2366.

1. (1973) 2 S.C.J. 484 : A.I.R. 1971 S.C. 2366.

extended definition of a tenant under section 2 of the Amending Act XXIV of 1973. In order for any person to come within the extended definition of a tenant (1) he must be a person liable to pay rent in respect of the land to which the tenancy relates under the tenancy agreement, express or implied, and (2) such person "continues in possession of the land even after the determination of the tenancy agreement or (1) he must be a person who was a tenant which means that determination of the tenancy does not matter, (2) he should have been a tenant under a tenancy agreement to which the Act was applicable, (3) he or his predecessor in interest had erected any building on the land and (4) he continues in actual physical possession of the land and building". If these requisites are satisfied by anyone, he will be a tenant within the extended definition of the expression and this will be so notwithstanding the fact that such person was not entitled to the rights under the Act by reason of the proviso to section 12, as it stood before its repeal, or that a decree for delcaration or a decree or order for possession had been made against such person on the ground of the proviso to section 12 before its repeal which disentitled him from claiming rights under the Act. In our opinion, the requirement under section 2 (4) (ii) (a) or (b) as to continuance in possession of the land or continuance in possession of the land or continuance in actual physical possession of the land and building has to be satisfied not only as on the date the Amending Act XXIV of 1973 came into force and on the date of the application for sale, but also subsequently until an order is made under section 9 and the same as well the provisions of that section are fully worked out. Such a requirement is necessary. Clauses (2) and (3) of section 9 as a matter of fact, imply that the tenant continues in possession of the lands to be dealt with as contemplated therein even after the stage of fixing the price and payment thereof, even in the context of application under section 9 (1) (a) (ii).

8-A. Once Varadaraja Pillai put the landlord in possession of the land and building as afore said, he no more had any rights under the Act, in particular to claim to be a tenant within the extended definition and on that basis to apply and get an order for sale of the land under section 9 (1) (a) (ii). Section 5 of the Amending Act IV of 1972 as already noticed made sections 3 and 4 inapplicable to a case in which the tenent before the commencement of that Act had delivered actual physical possession. The principle that once the tenant has delivered possession of the demised land and building to the landlord, thereis an end of the tenancy and the tenant ceased to have that character any more, is with better force applicable to the extended definition of a tenant under the Amending Act XXIV of 1973.

9. Mr. Nambiyar says that the circumstances in which Varadaraja Pillai was compelled to deliver possession of the land and building to the landlord should make a difference. We do not see how. The judgment and decree of the Supreme Court while making a declaration that the landlord became the owner of the land and building, directed the tenant to deliver possession of both and in our opinion it makes no difference whether actual delivery was taken by the landlord in execution of that decree or Varadaraja Pillai in compliance with his undertaking as a condition for stay granted by the Supreme Court, delivered possession of the land and building. In either case, it was in satisfaction of the decree granted by the Supreme Court for possession. The circumstances of the delivery of possession are irrelevant and what is essential for the extended definition of a tenant to apply is that he must continue in possession of the land or continue in actual physical possession of the land and building. The word 'continues' suggests that possession with the person claiming to be tenant within the extended definition only at the time of the application under section 9 (1) (a) (ii) will not suffice.

10. Secondly it appears to us that section 4 of the Amending Act of 1972 has not affected the continues operation of the decree and Judgment of the Supreme Court. We think that the *non-obstante* clause in that section does not have the effect of rendering the judgment and decree null and void. Having by section 3 of that Act, repealed the proviso with

retrospective effect so as to make it non-existent from the inception, section 4 of the Amending Act directs itself to rendering null and void with similar retrospective effect any stipulations in a tenancy agreement to which the Act was applicable which would be valid if the proviso had continued to operate. In order to effectuate that objective and since it was necessary for that purpose to depart from the view of the law as laid down in any judgment or decree or order of any Court or other authority to the contrary the *non-obstante* clause was introduced in section 4. All that the *non-obstante* clause means is that, though Courts may have expressed in a judgment, decree or order a contrary opinion, nevertheless the invalidity of the stipulations should prevail. If judicial opinion was that such stipulations were valid, that should not stand in the way of the statute declaring such stipulations to be invalid. This does not mean that section 4 has the effect of nullifying the judgment of the Supreme Court in *H. Girdharidas* v. *V. Pillai.*[1]

11. We do not for a moment doubt the competency of the Legislature acting within the limits of its powers under one or more legislative entries to make retrospective or retrospective laws and under the cover of them, directing that certain judgments, decrees or orders to the contrary should not be given effect to. But that is not what section 4 of the Amending Act of 1972 has done. All that it has done is to declare the stipulations mentioned therein to be invalid and this declaration should prevail, though there may be judgments or decrees or orders to the contrary. That is not the same thing as by legislation directly nullifying judgments and decrees or orders of Courts, assuming that the Legislature can validly invade directly the realm of judicial power. Our attention has been invited to *Piare Dusadh* v. *Emperor*[2], *Subbayya* v. *Bhushan Rao*[3] *R. L. Arora* v. *State of Uttar Pradesh*[1], *Tirath Ram* v. *State of U.P.*,[2] *Ahmedabad Corporation.* v. *New S. S. & Weaving Company*[3] and *Janapade Sabha* v. *Chindwara etc*[4]. But in our opinion none of these cases enables us to uphold the contention of Mr. Nambiyar that the effect of the Amending Acts of LXXII and LXXIII is to nullify the judgment of the Supreme Court. Neither section 4 of the 1972 Act, nor any other provision in any of those Amending Acts, expressly or by necessary implication, extinguishes the decision of the Supreme Court as between the parties or even indicates that effect should not be given to that decision. The decided cases which interpreted the *non-obstante* clauses using the expression 'notwithstanding' have been concerned with notifications, assessment orders, vesting orders, appointment orders of Tribunals or Courts of first instance and they show that the scope of the notwithstanding clause will depend on a variety of matters. *R.L. Arora* v. *State of Uttar Pradesh*[1], is a peculiar case in which invalidation by Court of a notification under section 6 of the Land Acquisition Act by quashing process was set at naught by a legislation validating the notification. But the ratio in this case has no application to the interpretation of the *non-obstante* clause in section 4 of the 1972 Act or in the other provisions of the 1973 Amending Act, where it occurs. In our view, the judgment and decree of the Supreme Court are still operative and in full force. That means by reason of the declarations given by them, the landlord has become the owner of the land and building. In the absence of dual ownership that is to say, the land owned by the landlord and the building thereon owned by the tenant, there is hardly any room for the applicant to invoke the Madras City Tenants' Protection Act as amended by the aforesaid three Amending Acts.

1. (1973) 2 S.C.J. 484 : A.I.R. 1971 S.C. 2366.
2. (1944) F.C.R. 61 : (1944) 1 M.L.J. 305 : A.I.R. 1944 F.C. 1.
3. I.L.R. (1942) Mad. 60 : (1941) 2 M.L.J. 125 ; A.I.R. 1941 Mad. 817.

1. (1964) 2 S.C.J. 652: (1964) 2 M.L.J. (S.C.) 148 : (1964) 2 An.W.R. (S.C.) 148 : (1964) 2 Comp.L.J. 309 : A.I.R. 1964 S.C. 1230.
2. (1974) 2 S.C.J. 180 : A.I.R. 1973 S.C. 405.
3. (1971) 1 S.C.J. 446: (1971) 1 S.C.R. 268: A.I.R. 1970 S.C. 1292.
4. (1970) 2 S.C.J. 454: (1970) 3 S.C.R. 745: A.I.R. 1971 S.C. 57.

12. Thirdly we do not see how this Court can be aksed to review the judgment and decree of the Supreme Court. Section 9 (3-A) only enables the Court which passed the decree or order to reopen or review the same. Article 137 of the Constitution provides that the Supreme Court shall have power to review any judgment pronounced or order made by it. This power is of course subject to the provisions of any law made by Parliament or any rules made under Article 145. Article 145 empowers the Supreme Court to make rules, with the approval of the President, for regulating its practice and procedure, including rules as to the conditions subject to which any judgment pronounced or order made by it may be reviewed and the procedure for such review including the time within which applications for the purpose are to be entered. Accordingly Order 40 of the Supreme Court Rules provides for it. Article 142 (1) says that any decree or order passed by the Supreme Court shall be enforceable throughout the territory of India in the manner prescribed by or under any law made by Parliament and until such provision is made in such manner as the President may by order prescribe. None of these provisions which we have referred to enables this Court to review the judgment and decree of the Supreme Court. The power of review by this Court is under section 114 read with Order XLVII, rule 1 of the Code of Civil Procedure. Both the section and the order give power to review to the Court which passed the decree or made the order. The expression the Court which passsed the decree means under section 37 of the Code of Civil Procedure, the Court of first instance, but this is only for purpose of execution of the decree or order. There is nothing in section 9 (3-A) of the Madras City Tenants Protection Act as amended to suggest that the expression "the Court which passed the decree" therein means the Court of first instance. As a matter of fact as we have seen earlier, Varadaraja Pillai himself applied to the Supreme Court for review of its judgment in the light of the Amending Acts, but he withdrew the petitions. It was suggested that in as much as section 9 (3-A) speaks of the power to reopen not only a judgment and decree but also the proceedings relating to a decree or an order, this Court may well exercise this power. But the point is the Court which passed the decree or order is not this Court, but the Supreme Court and this Court cannot reopen or review that decree or order and that being so, it cannot also direct restitution.

13. That will suffice to dispose of these applications and on the view we have taken as above, we do not think it necessary to go into the constitutional validity of the Amending Acts. It was argued that on the death of Varadaraja Pillai, his applications for relief under section 9 abated. It is said that the right to apply for sale is not a right to or in property and that therefore there can be no succession to that right. On that basis it is urged that the heirs of Varadaraja Pillai cannot continue the applications. This question again we do not think it necessary to decide as in any case, the applications have to fail.

14. All these applications are dismissed except Application No. 2698 of 1974. In consequence the Original petitions in the Court of Small Causes and the City Civil Court will also stand dismissed. No costs.

15. In view of this, no orders are necessary on Application No.2698 of 1974 and it is closed.

16. Lastly C.S.No.28 of 1964 will now go before the Original side of this Court for disposal in accordance with the directions in the judgment and decree of the Supreme Court in *H. Girdharidas* v. *V. Pillai*.[1]

R.S. ——— *Ordered accordingly*

1. (1972) 1 S.C.R. 291 : (1973) 2 S.C.J. 484 ; A.I.R. 1971 S.C. 2366.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao* and *S. Maharajan, JJ.*

T. R. Krishnamoorthy and others. .. *Appellants**

v.

T. S. Krishnamachary and others .. *Respondents.*

(*A*) *Code of Civil Procedure* (*V of* 1908), *section* 92—*Public Trust—Trust properties—Suit for declaration and possession—Suit by trustees—Whether consent of Advocate-General necessary.*

A suit was filed by the trustees of the suit trust for recovery of possession of the suit properties from sons of the defendants who were merely in the position of *trustees de son tort.* A question as to the maintainability of the suit was raised for want of the written consent of the Advocate-General.

Held. The suit was clearly outside the mis- chief of section 92 of the Code of Civil Procedure. [*Para.* 12.]

(*B*) *Tamil Nadu Hindu Religious and Charitable Endowments Act* (*XXII of* 1959), *section* 108—*Suit by trustees for possession—Legal representatives of a former trustee unlawfully continuing in possession—Whether suit barred by statute.*

A suit was filed by the present trustees against the legal representatives of a former trustee, who unlawfully continued in possession of the trust properties. It was contended by the defendants that the suit was not maintainable in a civil Court in view of section 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959.

Held : There was nothing in the provisions of the Act, which places an embargo upon the trustees of a public trust filing a suit against a trespasser for recovery of possession of the trust properties and the suit therefore, was not barred. [*Para.* 13.]

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* Appeal Nos. 343 of 1969 and 311 of 1970. 11th November, 1974.

Cases referred to :—

Peddakka v. *Sri Agastheeswara Swami*, (1956) An.L.T. 750 : (1956) An.W.R. 908; *Appanna Poricha* v. *Narasimha Poricha*, (1922) I.L.R. 45 Mad. 113 : 41 M.L.J. 608 : A.I.R. 1922 Mad. 17; *Vedagiri Temple* v. *I.P. Reddy*, (1967) 1 S.C.R. 280: A.I.R. 1967 S.C. 781.

Appeals against the decree of the Court of the Subordinate Judge, Madurai, dated 28th March, 1969, in Original Suit No. 95 of 1967 respectively.

K. Venkataraman, for Appellants.

O. V. Baluswami, M. R. Rajagopalachari, B. R. Ramesh Bapu and *A. Sundaram Iyer*, for Respondents.

The Judgment of the Court was delivered by

Maharajan, J. —The suit out of which these two appeals arise was instituted *in forma pauperis* by three plaintiffs, (1) for a declaration that they are co-trustees of the suit trust along with the fifth defendant (2) for a direction to the defendants 1 to 4 and 6 to hand over possession of the trust properties, accounts and records to the plaintiff and the fifth defendant, (3) for a direction to the defendants 1 to 4 to render a true and correct account of the income and expenses of the trust, both for the period prior to the death of Ramakrishna Iyer, father of defendants 1 to 3 and for the period subsequent to his death, (4) for a decree against defendants 1 to 4 to pay the plaintiffs and the fifth defendant all the amounts that may be found due on accounts, (5) for a diraction to the sixth defendant to pay the plaintiffs and the fifth defendant damages for wrongful possession of the plaint item 1 at Rs. 500 - per mensem from the date of plaint upto the date of delivery of possession, and (6) for costs.

2. The case of the plaintiffs was that the immovable properties situate in Madurai town and described in the plaint schedule as well as the cash of Rs.2,000 belong to the trust called "Thurvas J. Muninagendra Iyer, Nagier, Krishana Iyer, Jayarama Iyer Dharmam". As shown in the geneological table attached to the

plaint, the plaintiffs and the defendants 1 to 5 are the descendants of one Jagannatha Iyer, who had four sons, Muninagendra Iyer, Nagier, Krishna Iyer and Jayarama Iyer. By a registered deed dated 20th October, 1930, Lakshmana Iyer, son of Muninagendra Iyer, representing the first branch, Narasimha Iyer, son of Nagier, representing the second branch, Ramasami Iyer, Seshadri Iyer and Sundararaja Iyer, sons of Krishna Iyer, representing the third branch, and Subbier and Rama Iyer, sons of Jayarama Iyer, representing the fourth branch, created a trust. The trust deed shows that a sum of Rs.2,000 had already been endowed to the trust for the purpose of performing poojas and neivedyams to Sri Ramar and Hanumar already installed by the said Thurvas family at Sri Koodalagar Perumal Temple at Madurai, as well as for the performance of the annual Sri Ramanavami Festival. Under the said document, a further sum of Rs.10,500- was endowed for the purpose of constructing a platform for the Dwajasthambam already built by the said family in the said temple, for the purpose of completing the gold covering of the Dwajasthambam and for the purpose of celebrating the Kumbabishekam for the Dwajasthambam as well as for the purpose of completing the construction of an incomplete chatram building in Door No.1, Nallathannir Kinar Lane, South Masi Street, Madurai. The chatram building for which the foundation had been laid and basement had been constructed was also endowed under the deed, which provided that the idol of Krishnaswami should be installed in the chatram at a cost of Rs. 1,000 from out of the trust amount of Rs. 10,500. Under the said deed of trust all the records, accounts and cash belonging to the trust were to be with the branch of Muninagendra Iyer. Four trustees were appointed under that deed for the performance of the trust, and they were Lakshmana Iyer belonging to the first branch, Narasimha Iyer, belonging to the second branch, Seshadri Iyer belonging to the third branch and Subbier belonging to the fourth branch. It was provided in the deed that if any co-trustee in any branch died, he should be succeeded by a person older in age in that particular branch as a co-trustee. Accordingly upon the death of Lakshmana Iyer, his brother's son T.M.V. Ramakrishna Iyer, who was the father of the defendants 1 to 3 and the husband of the fourth defendant, being the oldest in that branch, became the co-trustee in the place of Lakshmana Iyer. Likewise, upon the death of the other co-trustees, who represented the three other branches, the oldest persons in each branch became the co-trustees. On the date of suit, the plaintiffs 1 to 3 had become the co-trustees representing the three branches. T. M. V. Ramakrishna Iyer, who became the co-trustee, was permitted at his own request, to manage the trust properties himself and to keep correct and proper accounts of the income and expenditure of the trust on condition that he showed the accounts for checking and verification whenever his co-trustees demanded the same. It was also agreed between Ramakrishna Iyer and the three co-trustees that whatever cash belonging to the trust that remained in the hands of Ramakrishna Iyer should be utilised by him on payment of compound interest at 6 per cent per annum with annual rests. This arrangement was entered into because the three other branches became financially weak. After Ramakrishna Iyer became the co-trustee, he spent for the construction of the incomplete chatram by advancing monies out of his joint family funds and was repaying himself out of the rental income from the chatram buildings. He leased out the chatram building, Door No.1, Nallathanni Kinar Lane, South Masi Street, Madurai, and the adjoining building, Door No.7-A (items 1 and 2 in the plaint schedule) to various tenants and realised the rentals from them. As he failed to perform the charities as directed in the deed of trust and to show the co-trustees the accounts of the trust for verification, a registered notice was sent to Ramakrishna Iyer and his brothers on 19th March, 1952, by the then three co-trustees calling upon him to render accounts of his management of the trust funds. By his reply dated 10th April, 1952, Ramakrishna Iyer made certain false allegations, while at the same time expressing his willingness to show the accounts. But Ramakrishna Iyer failed to show the accounts to the co-trustees

and continued to carry on the management of the trust till he died on 21st May, 1962. Thereafter, the defendants 1 to 3, his sons, and the fourth defendant, his widow, have been in possession of the trust properties including the cash. accounts, records, etc. As per the trust deed, the fifth defendant alone is entitled to succeed Ramakrishna Iyer as co-trustee, because he was next oldest male member, in Ramakrishna Iyer's branch. The defendants 1 to 4 are not entitled to retain the trust properties or accounts and are, therefore, liable to render accounts of the management by Ramakrishna Iyer as well as for their worngful management of the trust after the death of Ramakrishna Iyer. The properties will fetch a monthly income of not less than Rs.600, and the defendants 1 to 4 are, therefore, liable to pay the plaintiffs and the fifth defendant damages or mesne profits at the said rate from the date of death of Ramakrishna Iyer till delivery of possession. The defendants 1 to 3 would appear to have leased out the chatram building in Door No.1, Nallathannir Kinar Lane, South Masi Street, Madurai, to the Sixth defendant on a rent of Rs. 500 per mensem. In reply to the notice sent by the plaintiffs, the sixth defendant falsely alleged that the rent was only Rs. 250. The sixth defendant is liable to be ejected from the premises and to pay damages at Rs. 500 per mensem. These are the facts on the basis of which the plaintiffs claimed the reliefs already mentioned. The plaintiffs also prayed for the framing of a scheme for the administration of the suit trust but they gave up that relief subsequently.

3. The defendants 1 to 3, in their objections to the pauper petition, denied that the plaintiffs were the co-trustees. According to them even from 1913, the management of the trust vested in their family, their paternal grandfather managing it till his death, and thereafter their father Ramakrishna Iyer managing it exclusviely. During the minority of their father, Ramakrishna Iyer, his mother and guardian Kaveri Ammal and Muthulakshmi Ammal were managing the trust. After the death of Ramakrishna Iyer, the first defendant has been managing the affairs of the trust. Further, the Court would have no jurisdiction to take cognizance of the suit, as under the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act, the reliefs prayed for by the plaintiffs can be granted only by the Deputy Commissioner.

4. In their answer to the plaintiffs, after the pauper original petition was converted as suit, the defendants 1 to 4 stated that they were not aware of the trust deed dated 20th October, 1913 mentioned in the plaint, that the gift deed dated 20th October, 1913 executed by Lakshmana Iyer would reveal that his heirs alone would be entitled to the suit properties, that neither the plaintiffs nor their ancestors had any right to manage the trust properties, that the suit was barred by limitation, and that under section 92, Civil Procedure Code, the suit was barred for want of sanction by the Advocate-General.

5. In their additional written statement filed nearly 1½ years after their original written statement, the defendants 1 to 4 pleaded that the suit properties originally belonged to the entire joint family of the four branches, that the manager of the Hindu undivided family had no right to execute a gift deed, that the endowment itself was invalid *ab initio*, and that the defendants 1 to 4 were in law entitled to ignore the document and to treat the properties as continuing to vest in the joint family. They further pleaded that the plaintiffs did not exercise any act of ownership in respect of the suit properties and that they were ousted therefrom by the forefathers of the defendants who have been in enjoyment adversely to the plaintiffs, and thereby acquired prescriptive title.

6. The fifth defendant, who is the brother of Ramakrishna Iyer, filed a separate answer, in which he contended that after Ramakrishna Iyer's death, he succeeded him as the sole trustee and that a decree might be granted as prayed for in favour of the fifth defendant alone.

7. The sixth defendant, in his answer, admitted that he was in possession of item 1 of the plaint schedule as lessee, and that

he obtained the lease *bona fide* from the first defendant for a period of five years from 16th June, 1965 at a monthly rental of Rs.225 under the impression that the first defendant was the managing trustee of the above trust. The sixth defendant further stated that he was willing to pay the rent to the plaintiffs if ordered by the Court.

8. The plaintiffs filed a replication statement, in which they contended that inasmuch as the suit trust deed dated 20th October, 1913 had been acted upon up to date, it is valid and binding on all the four branches, and the defendants 1 to 4 were not entitled to ignore the same. They denied that Ramakrishna Iyer and his sons have acquired any title by adverse possession. Ramakrishna Iyer was in possession only in pursuance of the authority granted by his co-trustees.

9. The learned Principal Subordinate Judge, Madurai, framed five issues. He recorded the finding that the members of the four branches endowed the suit properties in trust for the performance of certain religious charities in the Koodalagar temple at Madurai, that the trust was created for the benefit of the four branches, that it was not the private exclusive family trust belonging to the first branch, that the trust was not a public trust, but a private one, that, therefore, the suit was not barred under section 92 (1) of the Code of Civil Procedure for want of sanction of the Advocate-General, that the suit was not barred by any of the provisions contained in the Tamil Nadu Hindu Religious and Charitable Endowments Act, that the defendants 1 to 4 had not perfected title to the right of sole trusteeship by adverse possession, that after the death of Ramakrishna Iyer, the fifth defendant succeeded him as trustee under the trust deed, that on the date of the suit, the plaintiffs and the fifth defendant were entitled to function as trustees of the suit trust, and that the sixth defendant who had obtained a lease from the first defendant, must be regarded as a trespasser and is therefore liable to be evicted. The learned Subordinate Judge further held that the defendants 1 to 4 as the legal representatives of Ramakrishna Iyer are not liable to render accounts, and that the suit being one for accounts, pure and simple, and not for any specific sum of money, is not maintainable. Consequently, he granted a decree declaring the plaintiffs and the fifth defendant as the lawful trustees of the trust entitled to be in possession and management of the trust and its properties and directing the defendants 1 to 4 and 6 to hand over possession of the suit properties to the plaintiffs and the fifth defendant. The decree directed that the mesne profits payable by the defendants 1 to 4 and 6 from the date of plaint upto the date of delivery of possession be ascertained in a separate enquiry under Order 20, rule 16, Civil Procedure Code. The claim for rendition of accounts and for the framing of a scheme was dismissed. The plaintiffs were awarded proportionate costs against the defendants 1 to 4 and 6, who were directed to pay the proportionate Court fee due to the Government. The balance of the Court fee was directed to be paid by the plaintiffs.

10. Against this judgment, the defendants 1 to 4 and 6 have preferred A.S.No. 343 of 1969 and the plaintiffs have filed A.S.No.311 of 1970 attacking the judgment of the lower Court in so far as it refused to grant them the relief of rendition of accounts.

11. The following points arise for determination in both these appeals :—

1. Whether the suit endowment was made by the ancestors of the plaintiffs and defendants 1 to 5 or exclusively by the grandfather of the defendants 1 to 4?

2. Whether it is open to the defendants 1 to 4 to contend that the endowment is in any event void *ab initio* ?

3. Whether the defendants 1 to 4 and their predecessor have by adverse enjoyment prescribed title to exclusive trusteeship of the suit trust ?

4. Whether the three branches represented by the plaintiffs 1 to 3 have abandoned their right to trusteeship ?

5. Whether after the death of Ramakrishna Iyer, the right to manage the trust has devolved on the fifth defendant or on defendants 1 to 4 ?

6. Whether the suit for rendition of accounts against the legal representatives of Ramakrishna Iyer is not maintainable? If maintainable, what is the nature and extent of the liability of defendants 1 to 4?

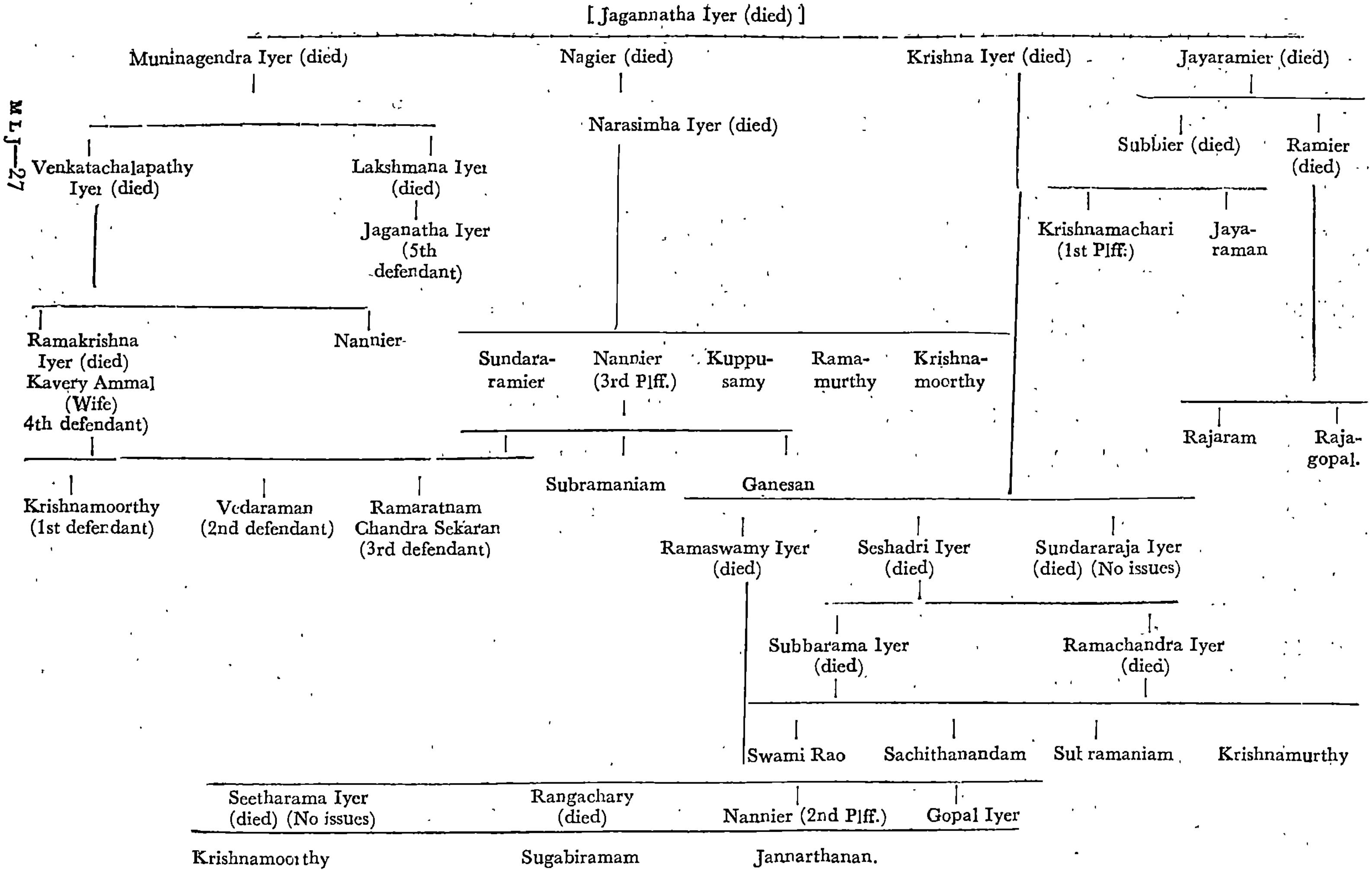
7. Whether the defendants 1 to 4 are not liable to render accounts for the period of their management?

8. Whether the suit is barred under section 92, Civil Procedure Code, or under any of the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act?

9. Whether the sixth defendant has been lawfully let into possession of item 1 of the plaint schedule as tenant, and if not whether he is not liable to be evicted therefrom?

10. Whether the sixth defendant is liable to pay damages for wrongful occupation, and if so, at what rate and to whom?

Point No. 1: The following geneological table enables us to understand the relationship between the parties *inter se*:


[Jagannatha Iyer (died)]
Muninagendra Iyer (died)
Nagier (died)
Krishna Iyer (died)
Jayaramier (died)
Narasimha Iyer (died)
Subbier (died)
Ramier (died)
Venkatachalapathy Iyei (died)
Lakshmana Iyei (died)
Jaganatha Iyer (5th defendant)
Krishnamachari (1st Plff.)
Jaya-raman
Ramakrishna Iyer (died) Kavery Ammal (Wife) 4th defendant)
Nannier
Sundara-ramier
Nannier (3rd Plff.)
Kuppu-samy
Rama-murthy
Krishna-moorthy
Rajaram
Raja-gopal.
Krishnamoorthy (1st defendant)
Vedaraman (2nd defendant)
Ramaratnam Chandra Sekaran (3rd defendant)
Subramaniam
Ganesan
Ramaswamy Iyer (died)
Seshadri Iyer (died)
Sundararaja Iyer (died) (No issues)
Subbarama Iyer (died)
Ramachandra Iyer (died)
Swami Rao
Sachithanandam
Sul ramaniam
Krishnamurthy
Seetharama Iyer (died) (No issues)
Rangachary (died)
Nannier (2nd Plff.)
Gopal Iyer
Krishnamooıthy
Sugabiramam
Jannarthanan.

Their common ancestor was one Jagannatha Iyer, who died leaving him surviving four sons (1) Muninagendra Iyer, (2) Nagier, (3) Krishna Iyer and (4) Jayarama Iyer. It appears that these four brothers remained undivided, and during their life time they spent out of the joint family funds and installed the deities of Sri Rama and Sri Hanumar in the Peeta Mantapam within the premises of Koodalagar Sundararaja Perumal temple in Madurai. The recitals in the subsequent settlement by their sons show that they performed the Kumbabishekam for the deities and plated part of the Dwajasthambam with gold, and with a view to perform Annadhana Charity, they endowed a site in which they laid the foundation of a chatram building and built a basement wall. They also endowed a sum of Rs 2,000 for performance of pooja and neivedyam on festival occasions for Sri Rama and Sri Hanuman. Before they could complete the building, the four brothers died, leaving them surviving the sons mentioned in the geneological tree. Subsequent to their death, that is to say, on 20th October, 1913 their sons, effected a partition of their joint family properties under Exhibit A-18. In this deed Lakshmana Iyer, son of Muninagendra Iyer, represented the first branch, whereas Narasimha Iyer, son of Nagier, represented the second branch, Ramaswamy Iyer, Seshadri Iyer and Sundararaja Iyer, sons of Krishna Iyer, represented the third branch, and Subbier and Ramier, sons of Jayarama Iyer, represented the fourth branch. In this deed, the members of the four branches provided that each branch should contribute Rs.7,500 worth of properties for carrying out the charities performed by their founding fathers. In pursuance of this term in the partition deed, Exhibit A-18, a deed of trust was executed on the same day, that is to say on 20th October, 1913 by the representatives of the four branches, who were also parties to the partition deed. Though the relationship among the four branches was denied by the defendants 1 to 4 in their answer the recitals made in Exhibit A-1 establish the correctness of the relationship set out in the geneological tree appended to the plaint. In this deed, reference is made to the fact that a sum of Rs. 2,000 had been set apart by the original four brothers for the purpose of performing pooja and neivedyam in the Sannidhis of Sri Ramar and Sri Hanumar in the Koodalagar temple and to the incomplete chatram built by the four brothers for the performance of Annadhanam charity. For the purpose of completing the gold plating of the Dwajasthambam and constructing a platform around the Dwajasthambam and for the purpose of the Annadhanam charity the executants of Exhibit A-1 endowed under this document, besides the sum of Rs.2,000 already endowed by their fathers, a further sum of Rs. 10,500 and a chatram site worth Rs. 5,000. There is a provision in this deed, which says that the chatram to be built should be named "Thurvas" J. Muninagendra Iyer, Nagier, Krishna Iyer, Jayarama Iyer. Dharmam. This recital gives the life direct to the story of the defendants 1 to 4 that the other branches have nothing to do with the trust and that it is their ancestor in the first branch who exclusively founded the trust. There is also a recital in Exhibit A-1 to the effect that Lakshmana Iyer of the first branch was in custody of the cash and records belonging to the trust and that Nos. 1, 2, 4, and 6 *viz*., Lakshmana Iyer, Narasimha Iyer Seshadri Iyer and Subbier, should be the trustees representing the respective four branches. There is also a term in this deed which delineates the line of succession to the four trustees, and it is to the effect that after the death of each of the then existing trustees, the seniormost member of his branch should succeed him. The terms of Exhibit A-1, therefore, make it clear that the suit endowment was made, not by the grandfather of the defendants 1 to 3 exclusively, but by the ancestors of the four branches jointly. We therefore, confirm the finding of the Court below in this behalf and answer this point against the defendants 1 to 4, who are the appellants in A. S. No. 343 of 1969.

Point No. 2:—The defendants 1 to 4 who, in their original answer, affirmed the suit trust and said that it had been founded by their ancestor and that the trust was being scrupulously performed from 1913 uptodate, performed a *volte-face* in their additional written statement, probably after they came to know the terms of

Exhibit A-1, which showed that the ancestors of the four branches had jointly created the trust. In their anxiety to frustrate the plaintiffs, the defendants contended in their additional written statement that the trust itself was invalid, because it related to ancestral joint family property, and the manager of a Hindu joint family had absolutely no right to execute a gift in favour of the trust. This is a plea which is clearly inconsistent with the stand of the defendants 1 to 4 in their original written statement and is altogether untenable. The first defendant, who is the eldest of the sons of Ramakrishna Iyer, was 31 years old in 1967 when the suit was filed. He must have been born, therefore, in 1936. The trust had been executed even in 1913, several decades before the birth of the defendants 1 to 3. As we have already mentioned, the trust appears to have come into existence, not even in 1913, but much earlier, during the lifetime of Muninagendra Iyer, the great-grandfather of the defendants 1 to 3. Neither Venkatachalapathy Iyer, the grandfather of the defendants 1 to 3, nor Ramakrishna Iyer, the father of the defendants 1 to 3, impugned the validity of the gift deed. On the other hand, the properties were gifted to the trust in pursuance of an arrangement entered into at the time of partition among the four branches. It is, therefore, clearly binding upon the four branches. We have little hesitation in negativing the plea of the defendants 1 to 3 that the trust deed is void *ab initio*. This point is answered against them.

Point No. 3 :—It appears that though the four branches were jointly managing the trust from 1913 for some years, the members of the second, third and fourth branches fell on evil days after the First Great War and became impecunious, with the result that the representative of the first branch was requested to manage the trust, advance monies out of his own pocket for construction of buildings in the trust property and to reimburse himself from the income of the trust property. These facts can be gathered from a lawyer's notice sent by Ramakrishna Iyer, the father of the defendants 1 to 3, on 10th April, 1952 (Exhibit A-4) in reply to Exhibit A-3 dated 19th March, 1952, a notice sent to him by: (1) Ramier, son of Jayarama Iyer, of the fourth branch (2) the second plaintiff, Nannier, son of Ramaswamy Iyer and grandson of Krishna Iyer, of the third branch, and (3) Nagier, son of Narasimha Iyer, of the second branch, in which, as co-trustees of Ramakrishna Iyer, they called upon the latter to render accounts in respect of the income from the trust properties. In his reply, Exhibit A-4, Ramakrishna Iyer made the following statements :

> " Though the trust deed enjoined all the 4 groups to contribute equally for the construction of the common trust premises and building at No.1, Nallathanneer Kinaru Street, South Masi Street, the other 3 groups, except my client, did not contribute anything. It may also be stated herein that due to heavy loss in business, due to speculative trade which the other 3 groups conducted in the last 1914-1918 Great War and even before that, all the 3 groups lost all their properties and most of them had reached the state of bankruptcy and some of them also were actually adjudged as insolvents. In these circumstances, my client's family was requested to spend for the constructions and also for carrying on the charities mentioned in the deed. As a fact the other groups requested and agreed for my client's spending and they also further agreed that whatever moneys my client spent, he should recoup from the income of the trust properties and whatever amounts advanced by the family shall carry interest at 12 per cent. per annum. Accounts have been properly maintained for the trust both with reference to the income and also expenses and amounts to the tune of several thousands of rupees were spent for putting up substantial construction of a house in Nallathanneer Kinaru Street and by virtue of such construction the building is now yielding Rs.250 per mensem ".

Ramakrishna Iyer made the following statements also in his reply notice, which throw light upon the nature of his possession of the trust properties :

"My client also has been appropriating the rents and profits received towards the amounts due to the family all these years and even this appropriation is being made only after meeting out the other expenses of the trust. Even now as per the accounts a sum of Rs.2897-4-8 is still due to my client for the year ending with Punguni 30th of Vikruthi. The said appropriation has been made only for the principal amount and interest is outstanding all these years. The accounts of the trust as well as the family accounts of "T.M.V.L. Sons" would disclose this fact."

It is clear from this reply notice that because the members of the other branches became either impecunious or were adjudged insolvents, they requested the representative of the first branch to manage the trust on their behalf after authorising him to spend monies for the construction of the chatram out of his own pocket and to reimburse himself out of the income from the trust properties. It is also clear from Ramakrishna Iyer's reply, Exhibit A-4 that till 10th April, 1952, a sum of Rs.2,897-4-8, remained due by the trust to his branch. If Ramakrishna Iyer's branch was allowed to be in management of the trust properties, without let or hindrance from the other three branches, it was evidently because of the authority conferred on him by the other three branches to manage the trust on their behalf, to lend monies out of his own pocket to the trust and to reimburse himself out of the income from the trust properties. Ramakrishna Iyer's possession of the trust properties was thus found to be referable to the lawful arrangement entered into among the four branches. There is, therefore, no basis for the plea of the defendants 1 to 4 that Ramakrishna Iyer had ousted his three co-trustees and was in exclusive possession of the trust properties in hostility to them so as to be able to prescribe title to the exclusive trusteeship for the suit trust. It is true that in Exhibit A-4 Ramakrishna Iyer also set up a plea that he had become the sole trustee by adverse possession, but then that plea was necessarily inconsistent with the arrangement set forth by him in Exhibit A-4, whereby, according to Ramakrishna Iyer himself he was requested by the other three branches to manage the trust, spend out of his pocket and reimburse himself out of the income from the trust properties. If his sole management was due to the authority and permission granted by the other branches, and if, as he said, a sum of Rs.2897-4-8 still remained due to him from the trust, he was entitled to continue in possession of the trust properties till his entire dues were discharged; and he could not during the relevant period be deemed to be in possession adversely to his co-trustees. It is not known on what date the amount due to him by the trust was fully discharged along with the interest which he claimed to be outstanding. Ramakrishna Iyer himself died on 21st May, 1962. On 10th July, 1965, the plaintiff, issued a registered notice to the defendants 1 to 3 calling upon them to hand over possession of the trust properties and to render accounts of the transactions of the deceased Ramakrishna Iyer. The defendants 2 and 3, who received the notice, sent no reply. The suit itself was filed on 17th January, 1966. The defendants 1 to 4 have, therefore, failed to establish their plea in their additional written statement that by enjoyment of the suit trust adversely to the other three branches, they have prescribed title to the sole trusteeship of the suit trust. Where, as per Exhibit A-1, the representatives of the four branches are entitled to jointly manage the trust, and where in the eye of the law, possession of the trust properties by one of many joint trustees will be deemed to be possession on behalf of all, and where it is further admitted that the exclusive possession by Ramakrishna Iyer was referable to the permission of his co-trustees, very strong and unequivocal evidence would be needed indeed to support the improbable story that Ramakrishna Iyer prescribed title to the office of his three co-trustees by adverse enjoyment as against them. It is true that 14 years had elapsed between Exhibit A-4, in which Ramakrishna Iyer claimed to be in adverse possession, and the date of plaint. But then, as we have already held, the claim of adverse possession by Ramakrishna Iyer in Exhibit A-4, was untenable as he admitted in the same breath that it was at the request of his

co-trustees, the representative of his branch was in exclusive management of the trust properties and that in pursuance of that request, he had spent monies out of his pocket for constructing buildings on the trust site and that monies were still due by the trust to him to the tune of Rs. 2,000 odd along with interest for several years. The plea of adverse possession by Ramakrishna Iyer would again have meaning and substance only after he had exhausted the authority of his co-trustees to be in possession of the trust properties and to discharge the monies due to him by the trust. As there is no evidence as to when exactly the loans advanced by Ramakrishna Iyer to the trust were fully discharged and as there is no evidence that after the discharge of such loan, Ramakrishna Iyer or his sons asserted any title in hostility to the plaintiffs, we have little hesitation in holding that the defendants 1 to 4 have failed to substantiate their plea of adverse possession. We agree with the Court below and answer this point against the defendants.

*Point No.*4:—The plea of the defendants that the three branches of the plaintiffs abandoned their right to joint trusteeship is not substantiated either. Under Exhibit A-1, a formal registered deed, the representatives of the four branches have been solemnly constituted as joint trustees. If the abandonment pleaded were true, one would look for an equally formal registered deed evidencing it. But no such deed has been produced by the defendants. Nor is there any evidence to show on what date under what circumstances the branches Nos. 2, 3 and 4 abandoned their trusteeship interest and who are the representatives of those three branches who were parties to the abandonment. The issue of a notice, Exhibit A-3, dated 19th March, 1952 by the plaintiffs shows no consciousness of the abandonment whatsoever. Evidently they waited for Ramakrishna Iyer to reimburse his dues out of the trust income before revising their right to joint management of the trust. In the absence of any affirmative evidence adduced by the defendants in this behalf, we feel constrained to answer this point against the defendants.

*Point No.*5:—Reference has already been made to the line of succession prescribed in Exhibit A-1, the deed of trust. Learned counsel for the defendants would construe the relevant passage in Exhibit A-1 to mean that the line of succession was prescribed only for one generation after the death of the original trustees and that no provision has been made for the mode of devolution of the office of the trusteeship thereafter.

We are unable to agree. The terms of the deed show that the intention of the founders was to make a comprehensive and detailed provision for the administration of the trust for all time; for instance, the deed says that out of the surplus income from the trust properties, the trustees shall buy nanja lands, houses and shop buildings in their names for the benefit of the trust and lend the monies of the trust for interest. Another clause says that the trustees may, whenever necessary, delegate their functions to others, but the delegate shall not be entitled to any salary or remuneration. It appears that it was presumably in pursuance of the power to delegate, the three branches delegated their functions to the representative of the first branch, because they were in straitered circumstances. Another clause in the deed says as follows:

"இப்பொழுது ஏற்பட்டிருக்கிற டிறஸ்டிகளும் அவர்களுக்குப்பின் எங்களுள் நாலு குடும்பத்தில்-அந்தந்த குடும்பத்தில் ஜேஸ்டரா்யிருக்கிறவர்கள் டிரஸ்டிகளாயிருந்து மேற்கண்டபடி தர்மங்களை தவறுமல் நடத்தி வருகிறதென்றும்....
.........."

This passage may be translated as follows:

"The trustees who have been constituted now shall function as trustees and perform the charities without making any default and after them the eldest surviving member of each of the four branches shall become the trustees of the trust and conduct the charites."

There is nothing in the language of this clause to show that the line of devolution prescribed is limited to the immediate succession of the then co-trustees. A fair and reasonable reading of the recitals in the deed would show that the mode of devolution prescribed would apply every time a vacancy arose in the office of the trusteeship. If out of four trustees belong-

ing to the four respective branches, one trustee died, the eldest member of the branch to which the deceased trustee belonged, should succeed. If this is the mode of devolution, it would follow that when Ramakrishna Iyer, who belonged to the first branch died, his office of joint trusteeship devolved, not on defendants 1 to 3, who are the sons of Ramakrishna Iyer, but on the fifth defendant, who is the son of Ramakrishna Iyer's paternal uncle, and who was undoubtedly the eldest surviving member of the first branch at the time of Ramakrishna Iyer's death. It is not disputed that the third plaintiff is the eldest surviving member of the second branch, that the second plaintiff is the eldest surviving member of the third branch and the first plaintiff is the eldest surviving member of the fourth branch. We would, therefore, hold that upon the death of Ramakrishna Iyer, the right to manage the trust jointly with the plaintiffs 1 to 3 devolved, not on defendants 1 to 3 but on the 5th defendant. This point is answered accordingly.

Points Nos. 6 *and* 7:—It would follow from the findings recorded above, that the defendants 1 to 4, upon the death of Ramakrishna Iyer, retained possession of the trust properties merely as interlopers or *trustees de son tort*. They are, therefore, clearly liable to render accounts to the plaintiffs for the income and expenditure from the trust properties from 21st May, 1962, the date of death of Ramakrishna Iyer upto the date of delivery of possession. The learned Subordinate Judge erred in refusing to direct the defendants 1 to 4 to render accounts for the above period. As for the period during which Ramakrishna Iyer was in management of the trust properties, he would certainly be liable to render accounts to the plaintiffs. It goes without saying that he would be entitled to reimburse himself out of the trust monies in case it is found that he had advanced monies to the trust out of his own pocket. But since Ramakrishna Iyer is dead, the question arises what is the liability of the defendants 1 to 4 as legal representatives. It is clear that they are not accountable in the strict sense to the plaintiffs for the period of management of their father. But it is their duty to place before the Court a the accounts, vouchers and records in their possession with reference to the period of Ramakrishna Iyer's management. It is open to the plaintiffs to surcharge and falsify the accounts of Ramakrishna Iyer, and to the defendants to lead evidence contra. But if upon, scrutiny of the accounts of Ramakrishna Iyer for the period of his management, any amount is found due by him to the trust, the Court will be justified in granting a decree for that amount against the assets of Ramakrishna Iyer in the hands of the defendants 1 to 4. The learned Subordinate Judge committed an error in holding that the suit for rendition of accounts against the defendants without any claim for any specific sum of money was unsustainable. Admittedly the accounts are in the hands of defendants 1 to 4. It is, therefore, impossible for the plaintiffs, especially in view of the counter claim made by Ramakrishna Iyer, to specify the exact sum of money due by Ramakrishna Iyer to the trust. The money due, if any, could be ascertained only upon a scrutiny of the accounts, after they are produced. If any sum of money were found due by Ramakrishna Iyer to the trust, it willl be time enough then to direct the plaintiffs to pay the Court fee thereon as a condition precedent to their executing the decree for the said sum.

12. Reference may be made in this connection to a decision of Viswanatha Sastry J., reported in *Peddakka* v. *Sri Agastheswara Swami*[1] At page 753, the learned Judge has made the following observations, which have a bearing upon the liability of the defendants 1 to 4:

> "Merely because, the trustee, who is an accounting party, dies, the liability for accounting for his management is not at an end, nor do his books of account and vouchers gain an immunity from scrutiny or attacks which they would not have enjoyed if he had been alive. If the trustee is alive, he has to explain and vouch for every item of debit and credit in his books; but if he is dead, it might be difficult for the legal repre-

1. 1956 An.W.R. 908: (1956) An.L.T. 750.

sentative of the deceased trustee to explain the entries in the accounts in respect of transactions of which he had no knowledge. The mere fact that the trustee is dead does not mean that the accounts and vouchers kept by him should be accepted at their face value and not subjected to scrutiny or criticism in a suit for accounts by the *cestui que trust*. If the legal representative of the trustee is a purdanashin lady or an ignorant or illiterate woman who is not acquainted with her husband's affairs and had nothing to do with them, the Court will make due allowance and will not insist upon strict proof of the correctness of the accounts, or of the vouchers by the legal representative. All that I am pointing out is that it will be both possible for a legal representative to account for the management of a deceased trustee by producing the accounts kept by the deceased trustee to the extent to which the legal representative has personal knowledge or information. It follows, from what I have said, that a suit for the recovery of a specific sum of money is not the only remedy available to the *cestui que trust* against the legal representative of a deceased trustee and that a suit for accounts, which, in substance, is really a suit for the recovery of the amount that might be found due to the *cestui que trust* on taking the accounts of the trust estate would be maintainable. The only difference between a suit for accounts against a trustee and a suit for accounts against the legal representative of the deceased trustee is as regards the mode of accounting by such legal representative and as regards the onus of proving the truth and propriety of the several transactions to which the accounts and vouchers relate".

We respectfully adopt these observations of the learned Judge and answer these points against the defendants.

Point No. 8.—One objection to the maintainability of the suit is that this is a suit for directing accounts in respect of a trust created for public purposes of a charitable or a religious nature, and the suit, is, therefore, barred under section 92 of the Code of Civil Procedure, for want of the written consent of the Advocate-General. A Full Bench of this High Court in *Appanna Poricha* v. *Narasinga Poricha*[1] has held that a suit by a trustee of a public charitable or religious trust against a co-trustee for accounts does not fall within section 92 of the Code of Civil Procedure and may be brought without the consent of the Advocate-General. As explained in that ruling, the words "directing accounts and enquiries" in clause (1) (*d*) of section 92 of the Code of Civil Procedure, should be confined to suits by the Advocate-General or by two or more persons with his consent against all the trustees for an account of their management, and not to suits filed by one or more trustees against the others, as each trustee has a right to call upon the other to account to him for trust funds he has received, even though the other trustee commits no breach of trust. Further, in this case, the suit is filed not even against the co-trustees, but is filed by the plaintiffs, who are the trustees of the suit trust, for recovery of possession of the trust properties from defendant 1 to 4, who, we have already held, are merely in the position of *trustees de son tort*. The suit is, therefore, clearly outside the mischief of section 92 of the Code of Civil Procedure.

13. It is next contended that the suit is not maintainable in a civil Court in view of the provisions of section 93 of the Madras Hindu Religious and Charitable Endowments Act, 1951, corresponding to section 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, which runs as follows:

> "No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted, in any Court of law, except under, and in conformity with, the provisions of this Act".

There is nothing in the provisions of this Act, which places an embargo upon the trustees of a public trust filing a suit against a trespasser for recovery of posses-

1. (1922) I.L.R. 45 Mad. 113 : A.I.R. 1922 Mad. 17 : 41 M.L.J. 608.

sion of the trust properties. In *Vedagiri Temple* v. *I.P. Reddy*[1], the trustee of a temple filed a suit for rendition of accounts against the ex-trustees, in respect of their management of the temple. Their Lordships of the Supreme Court held that section 93 of Act, 1951, (which corresponds to section 108 of the present Act) only imposes a restriction on suits or other legal proceedings in respect of matters for which a provision has been made in the Act and that the legislative history of the section shows that even in regard to suits or other legal proceedings relating to administration or management of religious institutions, restriction is imposed only in respect of matters for which a provision is made in the Act; but the Act does not bar suits under the general law which do not fall within the scope of any of the sections of the Act. Their Lordships further held that Chapter VII of the Act, on which reliance was placed by the defendants as providing a complete machinery for deciding disputes in regard to accounts, has no bearing on the question of the liability of an ex-trustee to render account of his management to the present trustee and does not provide for determining or deciding a dispute in respect of such rendition of accounts. In this case, the suit is filed not even against the former trustees, but by the present trustees against the legal representatives of the former trustee, who unlawfully continued in possession of the trust properties. We have, therefore, little difficulty in holding that the suit is not barred under the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. This point is answered against the defendants.

Point No. 9:—On his own showing, the sixth defendant obtained a lease of item 1 of the plaint schedule only from first defendant, who, at the time of the lease, was a *trustee de son tort* or an interloper. He is not, therefore, in possession in pursuance of any lawful lease. Consequently, he is liable to be evicted. This point is answered against the sixth defendant.

Point No. 10:—It follows from the finding recorded above, that the sixth defendant is liable to pay damages for wrongful possession to the plaintiffs. There is no satisfactory evidence to show that item 1 would fetch more than the amount of Rs. 250, which, according to the sixth defendant, he has agreed to pay by way of rent. If he has paid any rent to the defendants 1 to 4, the latter will be liable to account to the plaintiffs for the same. For the period for which the sixth defendant has not paid any rent, he is liable to pay the same at the rate of Rs. 250 per mensem upto the date of delivery of possession.

14. In the result, A.S. No. 343 of 1969 will stand dismissed with costs. A.S. No. 311 of 1970 will stand allowed with costs, and the plaintiffs in addition to the reliefs granted by the lower Court, and in substitution of the direction of the lower Court for ascertainment of mesne profits will be granted a decree against defendants 1 to 4 to render account of the income and expenditure from the trust property for the period from the date of death of Ramakrishna Iyer upto the date of delivery of possession. The decree will further declare that the defendants 1 to 4 as the legal representatives of Ramakrishna Iyer will be liable to pay out of the joint family assets in their hands such amount as may be found due to the trust by Ramakrishna Iyer on a scrutiny of the accounts to be produced by defendants 1 to 4 for the period of management of the trust properties by Ramakrishna Iyer. The Court-fee payable on the plaint will be collected from the defendants 1 to 4. As for the sixth defendant, he will be liable to pay damages at the rate of Rs. 250 per mensem upto the date he vacates item 1 of the plaint schedule. In respect of the payment already made by the sixth defendant to the defendants 1 to 4, the defendants 1 to 4 will be liable to render accounts to the plaintiffs.

S.J. — *A.S.No.*343 *of* 1969 *dismissed*; *A.S.No.*311 *of* 1970 *allowed.*

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1. (1967) 1 S.C.R. 280 : A.I.R. 1967 S.C. 781.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

Kamalammal .. *Appellant**

v.

A N. Shanmugham *alias* **Gurunathan and others** .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 32, *rules* 1 *and* 2—*Guardian for minor appointed by Court—Minor's suit against L.Rs. of guardian after the latter's death to recover a sum of money—Suit instituted without next friend—Competency—Minor having no full knowledge of still being minor—Continuing suit after attaining* 21 *years—Effect.*

Where a minor for whom a guardian had been appointed by the Court brought a suit, while still a minor and without a next friend, against the legal representatives of the guardian after his death to recover a sum of money, having no full knowledge of his still being a minor, and continued the suit after attaining 21 years of age,

Held: All that Order 32, rule 2 (*i*), Civil Procedure Code, contemplates is a plaint being taken off the file on an application for the said purpose being made by the defendant. The Courts have made a distinction between two classes of suits instituted by a minor, one knowing that he was a minor and he was incompetent to institute a suit without a next friend and yet filing the suit with a view to deceive the Court and the other filing suit without knowing or realising his minotity, and, in the former case the suit being dismissed and in the latter case, the plaint being taken off the file. [*Para.* 3.]

In the instant case the minor completed the age of 18 and the period of minority got enlarged only under the special provisions of the Indian Majority Act, because a guardian had been appointed by the Court. The present suit was not a suit where the plaintiff instituted the same with the full knowlege that he was a minor and he was incompetent to institute the same without a next friend and he instituted the same with ulterior motives. Since the suit was continued by the plaintiff after he attained majority, the proceedings before the trial Court could be treated as if the plaint was taken off the file, but subsequently represented after the plaintiff attained majority, and continued thereafter, since no question of limitation arose. [*Para.* 3.]

The statutory provision under section 36 of the Guardians and Wards Act had no application. The provision itself contemplates a person or a next friend filing a suit on behalf of the minor against the guardian or his legal representatives for an account and it does not actually deal with a suit filed by a quandom minor against his erstwhile guardian or his legal representatives. [*Para.* 4.]

Appeal against the decree of the Court of the Subordinate Judge of Kancheepuram in Original Suit No. 69 of 1970.

S. Balasubramaniam, for Appellant.

R. Balasubramanian, for Respondent.

The Court delivered the following

JUDGMENT:—The first defendant in O.S. No. 69 of 1970, on the file of the Court of the Subordinate Judge of Kancheepuram, is the appellant herein. For the sake of convenience, the parties will be referred to as they were arrayed in the suit. The first defendant and second defendant are sisters and the second defendant has married the third defendant. The two plaintiffs are the sons of the second and third defendants. One Rajakotilingam Chettiar was the father of defendants 1 and 2, and, therefore, the father-in-law of the thrid defendant, and the maternal grandfather of the plaintiffs. It is admitted that, after the birth of the first plaintiff on 6th December, 1948, Rajakotilingam Chettiar filed O.P. No. 162 of 1949 on the file of this Court under the Guardians and Wards Act and was appointed as the guardian of the first plaintiff. Equally, it is admitted that, after the appointment as guardian, Rajakottilingam Chettiar, as the guardian of the first plaintiff and the third defendant, executed a sale deed in favour of one Natesa Mudaliar, for Rs 39,000 was evidenced by Exhibit A-2

* Appeal. No. 591 of 1972.
30*th October*, 1975.

dated 26th September, 1949 in respect of No. 7 Malayaperumal Street belonging to the first plaintiff. Out of this consideration of Rs. 39,000 a sum of Rs. 12,000 was retained by Rajakotilingam Chettiar for the purpose of discharing a mortgage existing previously in favour of one Murali Kaka Trust. The present suit was instituted by the first plaintiff for himself and as the guardian of his minor brother the second plaintiff, for the recovery of a sum of Rs. 25,216 putting forward the contention that Rajakotilingam Chettiar the erstwhile guardian of the first plaintiff, did not apply the said sum of Rs. 12,000 for the purpose of discharging the mortgage due to Murali Kaka Trust and he furnished false accounts to this Court and that ultimately it was the third defendant who had to discharge the mortgage debt. Rajakotilingam Chettiar himself died on 29th December, 1963 and it was thereafter the present suit was instituted for the recovery of the moneys from the estate of Rajakotilingam Chettiar in the hands of defendants 1 and 2. Several defences were put forward by the first defendant in the suit, the second and third defendants remaining *ex parte*, two of them being, that the suit was not maintainable because on the date when the suit was instituted the first plaintiff was a minor inasmuch as he had not complted the age of 21 and he was not represented by a next friend and secondly that the suit could have been instituted only with the permission of the High Court which ordered O.P.No. 162 of 1949, referred to already under section 36 of the Guardians and Wards Act, 1890. The learned Subordinate Judge of Kancheepuram negatived these defences of the first defendant and decreed the suit for a sum of Rs.10,930.91 with interest at six per cent.per annum from 1st January 1963. It is against this judgment and decree the first defendant in the suit has preferred this appeal.

2. I have not referred to the other contentions as well as the facts on which the contentions were based for the simple reason that the learned counsel for the appellant advanced only two arguments before me, both of them being said to be of a legal nature. The first argument is that under section 3 of the Indian Majority Act, a guardian having been appointed for the first plaintiff, he attained majority only on the completion of 21 years, that in this case admittedly on the date when the plaint was presented, the first plaintiff had not completed the age of 21 and he was not represented by a next friend and that therefore the suit was not maintainable. The second is that Rajakotilingam Chettiar, when he was appointed as guardian by this Court, had not executed any bond and that under those circumstances under section 36 of the Guardians and Wards Act, 1890, the suit, if at all, could have been instituted only with the leave of the High Court which appointed the guardian and that such leave not having been obtained, the suit was incompetent.

3. I shall now deal with the two contentions. I have already referred to the fact that the first plaintiff was born on 6th December, 1948 and Rajakotilingam Chettiar was appointed as the guardian for his property in O.P. No. 62 of 1949 by this Court. The suit itself was instituted on 1st February, 1968. Consequently, on the date when the suit was instituted, the first plaintiff had completed the age of 18, but not completed the age of 21. Therefore, under the provisions of section 3 of the Indian Majority Act of 1875, the first plaintiff was a minor on the date when the suit was instituted. The next question for consideration is what exactly is the consequence of the first plaintiff instituting the suit during such minority. The argument that appears to have been advanced before the trial Court was that on that ground, the suit should be dismissed. However, the learned trial Judge has pointed out that, though this point was raised by the appellant, before that point could be decided, the first plaintiff had attained majority by completing 21 years and continued the suit and that he was competent to do so. I am of the opinion that this conclusion of the trial Court is correct. Order 32 of the Code of Civil Procedure deals with suits by or against minors and persons of unsound mind. Rule 1 of the Order states that

> "every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor."

Under rule 2 (1)

> "where a suit is instituted by or on behalf of a minor, without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented."

Under sub-rule (2) of rule 2 :

> "notice of such application shall be given to such person, and the Court, after hearing his objection (if any) may make such order in the matter as it thinks fit."

Admittedly, in this case, no application under Order 32, rule 2, has been filed by the appellant for taking the plaint off the file. The above rule itself does not contemplate a suit instituted by such a minor plaintiff being dismissed on that ground. There is a difference between a suit being dismissed and a plaint being taken off the file, and all that Order 32, rule 2 (1) contemplates is a plaint being taken off the file on an application for the said purpose being made by the defendant. It is true the Courts have made a distinction between two classes of suits instituted by a minor, one knowing that he was a minor and he was incompetent to institute a suit without the next friend and yet filing a suit with a view to deceive the Court or with some ulterior purpose, and the other, a minor filing the suit without knowing or realising his minority and in the former case the suit being dismissed and in the latter case the plaint being taken off the file. As far as the present case is concerned, it is not even the case of the appellant herein that the first plaintiff instituted the suit with the knowledge that he was a minor and was incompetent to institute the suit without a next friend and that he did so with some ulterior purpose. As I pointed out already, he had already completed the age of 18, but had not completed the age of 21 and the period of minority gets enlarged only under the special provisions of the Indian Majority Act, 1875, in a case where the guardian has been appointed by the Court. Therefore, the present is not a suit where the first plaintiff instituted the same with the full knowledge that he was a minor and he was incompetent to institute the same without a next friend and he instituted the suit with ulterior motives. Therefore, the suit instituted by the first plaintiff could not have been dismissed. If at all, the plaint presented could have been taken off the file if the appellants had preferred an application for such a purpose under Order 32, rule 2 (1). Therefore, in this case, it is not open to the appellant to contend that the trial Court should have dismissed the suit on the ground mentioned above. Assuming that even without the application on the part of the appellant herein, the plaint should have been taken off the file, since the suit was continued by the first plaintiff after his attaining majority, there is no difficulty in treating the proceedings before the trial Court as if the plaint was taken off the file of the Court, but subsequently represented after the first plaintiff attained majority and the suit was continued thereafter and there is no impediment to so treating the proceedings because the appellant will not be damnified or prejudiced by such a conclusion since the question of limitation does not arise. Therefore, I am of the view that the conclusion of the trial Court that because of the first plaintiff attaining majority during the pendency of the suit, the suit could be continued by him and validly disposed of according to law, is correct.

4. The second point urged by the learned counsel for the appellant, as I pointed out already, is based upon section 36 (1) of the Guardians and Wards Act, 1890.

That provision states :

> "Where a guardian appointed or declared by the Court has not given a bond as aforesaid, any person, with the leave of the Court may, as next friend, at any time during the continuance of the minority of the ward, and upon such terms as aforesaid, institute a suit against the guardian, or, in case of his death, against his representatives, for an account of what the guardian has received in respect of the property of the ward and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representatives, as the case may be."

I am of opinion that this statutory provision has no application to the

present case. In the first place, the said provision itself contemplates a person as next friend fling a suit on behalf of the minor against the guardian or his representatives for an account and it does not actually deal with a suit filed by a quandom minor against his erstwhile guardian or his legal representatives. I have already indicated in dealing with the first point that the plaint presented by the first plaintiff could have been considered as having been taken off the file and then re-presented and pursued after he attained majority. To such a situation, section 36 (1) will have no application and therefore the contention of the learned counsel for the appellant that the suit instituted by the first plaintiff without obtaining the leave of the High Court which appointed Rajakotilingam Chettiar as the property guardian of the first plaintiff will have to fail, cannot be sustained.

5. No other point was urged before me. Accordingly the appeal fails and it is dismissed. Having regard to the fair stand taken by the learned counsel for the appellant by confining himself to the two points mentioned above, I am not ordering any costs against the appellant.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N.S. Ramaswami, J.*

Mrs. Johari Bi .. *Appellant**

v.

K. Vinayagym (died) and others .. *Respondents.*

Madras City Tenants Protection Act (III of 1922), *section* 9—*Landlord's suit for possession against tenant—Petition by tenant under section* 9—*Trial Court holding tenant not entitled to benefits of section* 9—*Appeal by tenant—Amending Act IV of* 1972 *coming into force—Application field by tenant after delay of* 60 *days but before the Amending Act XXIV of* 1973—*Application held within time.*

In a suit for possession by the landlord against the tenant, the tenant filed an application under section 9 of the Madras City Tenants Protection Act. On the basis of a covenant in the lease agreement, the tenant was held not entitled to the benefits of section 9 and the trial Court decreed the suit. The tenant filed an appeal. Pending the appeal, Act IV of 1972 came into force deleting the proviso to section 12. That meant that the tenant would be entitled to the benefits of section 9 in spite of the covenant in the lease agreement. The application by the tenant had been filed in the trial Court after a delay of 60 days. The plaintiff contended that the time of 30 days prescribed under section 9 was a conditition precedent. But by the Amending Act (XXIV of 1973) the word 'tenant' in section 2 (4) of the City Tenants Protection Act was amended and, a person who got a right by the amendment of section 12 was entitled to file an application within two months from the date of the publication of Act XXIV of 1973. On the question whether the tenant's application is therefore maintainable,

Held, the present application having been filed very much prior to the coming into force of the Madras City Tenants' Protection Amending Act, XXIV of 1973, the application was maintainable even without an application to excuse the delay. [*Para.* 6]

Cases referred to :—

Syed Ibrahim and others v. *Jalma and others*, (1968) 2 M.L.J. 83 ; *Kaku Chenchuramana Reddy* v. *Palapu Arunachalam*, 69 M.L.J. 283 : 42 L.W. 330 : I.L.R. 58 Mad. 794 : 158 I.C. 1 : A.I.R. 1935 Mad. 857. (F.B.)

Appeal against the order of the II additional City Civil Judge, Madras dated 31st July, 1973, and made in A.S. No. 83 of 1972 (City Civil Court, Madras) (O.S. No. 5517 of 1967 on the file of the IV Assistant City Civil Judge, Madras dated 21st December 1971).

A. Abdul Hadi, for Appellant.

K. N. Balasubramanian and *M. Krishnaswamy*, for Respondents.

* A A. O. No. 522 of 1974.
30*th October*, 1975.

The Court made the following

ORDER.—This appeal is against an order of remand in a suit, in which one of the questions was whether the defendant is a tenant entitled to the benefits of section 9 of the City Tenants Protection Act, hereinafter referred to as the Parent Act. The trial Court held, on the basis of a particular covenant in the written lease agreement that the proviso to section 12 of the Parent Act would apply, and that, therefore, he was not entitled to the benefits of section 9 thereof. So, a decree for possession was granted. The landlord had asked for arrears of rent also. That also been decreed by the trial Court.

2. When the appeal filed by the tenant was before the first Appellate Court, Act IV of 1972 had come into force and that Act had deleted the proviso to section 12. That meant, that inspite of the covenant in the lease deed, the tenant was entitled to file an application under section 9 of the Parent Act. However, the application had been filed by the tenant in the trial Court only after a delay of 60 days. It had been contended before the first Appellate Court, on behalf of the landlord, that such delay cannot be excused, because section 5 of the Limitation Act has no application. The contention was that the provision under section 9 that an application shall be filed within 30 days from the receipt of the summons in the suit, is not a period of limitation, but a condition precedent, and that, therefore, there is no scope for applying section 5 of the Limitation Act. This was not accepted by the first Appellate Court and it said that section 5 of the Limitation Act applies, and there was sufficient cause shown by the tenant to excuse the delay in filing the application under section 9. Therefore, it set aside the judgment and decree of the trial Court and remitted the matter to the trial Court for a fresh disposal. The landlord has filed this civil miscellaneous appeal questioning the said remand.

3. It is contended on the basis of the decision of Raghavan, J., in C.R.P.No. 2354 of 1972, dated 28th April, 1973, that the period of 30 days mentioned in section 9 of the Parent Act is a condition drecedent and not a period of limitation. In view of section 29(2) of the Limitation Act, 1963, which is different from the corresponding provision in the Limitation Act, 1908, there can be no dispute that if the period of 30 days mentioned in section 9 is one of limitation, then section 5 of the Limitation, Act is attracted as there is no specific exclusion. Section 29 (2) of the Limitation Act says that when the special or local law prescribes a different period of limitation, than what is contained in the schedules to the Limitation Act, unless the special or local law expressly excludes the operation of sections 4 to section 24 of the Limitation Act, all these sections would apply even to proceedings coming under the special or local law in determining the period of limitation. However, undoubtedly, the proceedings must be before a civil Court for invoking section 5 of the Limitation Act. In the present case, the matter is before a civil Court and, therefore, if what is contained in section 9 of the Parent Act, is a period of limitation for filing an application for getting the benefits under that Act, then undoubtedly section 5 of the Limitation Act is applicable, and if the Court is satisfied that there is sufficient cause for excusing the delay, it shall excuse. But the contention is, as I said, that section 9 does not prescribe a period of limitation for filing an application for getting the benefits of the Parent Act, but it is a condition-precedent. A reading of the section itself does not indicate that it is a condition-precedent. All that section 9 says is that an application shall be filed within one month after the service of the suit summons.

4. Raghavan, J., has referred to several decisions of this Court, including the one reported in *Syed Ibrahim and others* v. *Jalma and others*[1]. In none of these cases, the question arose whether the period prescribed in section 9 is one of limitation or whether it is a condition-precedent. So, those decisions have no bearing. The learned Judge (Raghavan, J.), has also referred to the Full Bench decision in *Kaku Chenchuramana Reddy* v. *Polapu Arunachalam*[2]. That was a case where a credi-

1. (1968) 2 M.L.J. 83.

1. (1935) 69 M.L.J 283 : 42 L.W. 330 : I.L.R. 58 Mad. 794 : 158 I.C. 1 : A.I.R. 1935 Mad. 857. (F.B.)

tor presented an insolvency petition beyond the period of three months provided under section 9 of the Provincial Insolvency Act, from the date of the act of insolvency. In that case also, the question whether section 5 of the Limitation Act had application did not arise for consideration, for the simple reason that under the Limitation Act of 1908, there is no scope for applying section 5 of the Limitation Act with regard to a proceeding where any special or local law prescribed a different period even if such a period is one of limitation. But, section 9 (1) of the Provincial Insolvency Act has really not prescribed a period of limitation. It says that a creditor shall not be entitled to present an insolvency petition against a debtor unless the act of insolvency on which the petition is granted has occurred within three months before the presentation of the petition. It is in a negative form. In other words, it prohibits a creditor from presenting an insolvency petition beyond the period of three months from the date of the act of insolvency. Therefore, it was said that it was a condition-precedent for the petitioning creditor that he should present the petition within three months of the alleged act of insolvency. That would have no bearing on the present question for two reasons. One is, here the language employed in section 9 of the Parent Act, is not negative in character as in the case of the Provincial Insolvency Act. Further, as I said, when the Full Bench decision was rendered, there was no scope for invoking section 5 of the Limitation Act in a proceeding under the Provincial Insolvency Act. Even if there was any such scope, because the language employed in section 9 of the Provincial Insovlency Act made it clear that it was a condition precedent for the creditor to present the petition within three months of the act of insolvency, he cannot be heard to say that the delay is to be excused.

5. Raghavan, J., has referred to the above decisions and without further discussion has stated that he was of opinion that section 9(1) of the Madras City Tenants Protection Act provides only a condition - precedent and not a period of limitation.

6. With respect to the learned Judge, I am not in a position to readily agree to this view. Under such circumstances, my duty would be to refer the matter to a Division Bench, but in the present case, that would not be necessary, because of the provision contained in the Amending Act, Act XXIV of 1973. As I said earlier, the Amending Act IV of 1972, deleted the proviso to section 12 of the Parent Act. It is because of such deletion, the tenant in this case gets a right to apply under section 9 for relief. No doubt, he had applied even before the amendment. Under the present definition of the word 'tenant' in sub-section 4 of section 2, as amended by Act XXIV of 1973, a person who gets a right to the benefits of the Act because of the deletion of the proviso to section 12 is also included, provided he continues in actual physical possession of the land and buildings. The amendment made by Act XXIV of 1973 to section 9 of the Parent Act says that any such person as is referred to above, is entitled to file an application for the necessary relief under the Parent Act within two months from the date of the publication of the said Amendment Act. The present application having been filed very much prior to the coming into force of the Amending Act, Act (XXIV of 1973), there is no difficulty in holding that such application is maintainable, even without an aplication to excuse the delay. Therefore, the order of remand has to be upheld.

7. However, the first Appellate Court. is not right in setting aside the entirt decree of the trial Court. One part of the decree is regarding the possession and the other part of the decree is with regard to arrears of rent. There is no ground to set aside the decree for arrears of rent, as there was no dispute rgarding the same. The First Appellate Court ought to have confirmed that part of the decree. Therefore, the civil miscellaneous appeal is partly allowed in that the decree of the trial Court regarding arreais of rent is confirmed. Ohterwise, the appeal is dismissed.

8. It is made clear that if the landlord chooses to file any additional counter to the application under section 9, he may

be allowed to do so by the trial Court. Parties to bear their own costs.

9. It is brought to my notice that the tenant, by way of abundant caution has filed a separate petition in O.P.No.491 of 1973 before the City Civil Court for relief under section 9, as amended by Act XXVI of 1973. That becomes unnecessary in view of what I have said earlier. Mr. K.N. Balasubramaniam, the learned counsel for the tenant says that he would not press that O.P., as there cannot be duplicate proceedings.

S.J. *Appeal partly dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*G. Ramanujam, J.*

K. Thangavelu, President and Member of the Committee of Perambalur Co-operative Primary and Development Bank, Perambalur ..*Petitioner**

v.

The Joint Registrar of Co-operative Societies, Tiruchirapalli Region and others .. *Respondents.*

Tamil Nadu Co-operative Societies Act (LXIII of 1961), *sections* 72 (i), 72 (6)—*Co-operative Bank—Supersession threat—Show cause notice issued to the Bank—Financing bank not consulted—Notice whether valid—Consultation necessary only before final order of supersession.*

The Joint Registrar of Co-operative Societies issued a show cause notice to the petitioner and other directors of a Bank as to why the Bank should not be superseded under section 72 (1) of the Tamil Nadu Co-operative Societies Act, 1961. The petitioner has filed this petition to quash the notice on the ground that the finaning bank was not consulted before the issue of the notice.

Held, Consultation as contemplated by section 72 (6) was necessary before the final order was passed under section 72 (1) and not before the issue of hsow cause notice. [*Para.* 4.]

Case referred to :

P.M.V. Credit Society v. *Registrar of Co-operative Societies*, (1973) 2 M.L.J. 200: 86 L.W. 494 : A.I.R. 1973 Mad. 460.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R.C. No. 1863 of 1975/B-3 dated 22nd May, 1975 on the file of the 1st respondent herein and to quash the said show cause notice R.C. No. 1863 of 1975 dated 22nd May, 1975.

N.C. Raghavachari for *N.S. Varadachari* and *J.V. Ramanujam*, for Petitioner.

S. Ramalingam and *T. Sathiadev* Assistant Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioner was the president of the Perambalur Co-operative Primary Land Development Bank, Perambalur. He had been elected as a director and later as president on 18th May, 1974. By a show cause notice dated 22nd May, 1975 the first respondent called upon the petitioner and other directors of the Bank to show cause as to why the Bank should not be superseded under section 72 (1) of the Tamil Nadu Co-operative Societies Act, 1961. It is to quash that notice the above writ petition has been filed.

2. According to the petitioner before issuing the impugned show cause notice the first respondent did not make any consultation with the financing bank as contemplated by section 72 (6) of the Act and therefore the show cause notice is invalid. It is also his case that the impugned show cause notice proceeds on the basis that the irregularities referred to in the notice have already been established and this shows that the first respondent has already made up his mined to supersede the Society under section 72 (1) and that the issue of the show cause notice is a mere formality. The petitioner further contends that the first respondent has initiated proceedings under section

* W.P. No. 3846 of 1975.

11*th August*, 1975.

72 (1) by issuing show cause notice at the instance of his political opponents and therefore his action in isssuing the show cause notice should be taken to be a *mala fide* one. It is also stated that the first respondent has got considerable bias against the petitioner in that the petitioner had filed more than one writ petition before this Court questioning certain actions of the first respondent and therefore even if the matters referred to in the show cause notice were to be enquired into, it should be by a different officer. It is also contended that most of the irregularities relate to an earlier period when the present society did not come into existence and therefore the show cause notice so far it relates to those irregularities should be taken to be bad.

3. As regards the first contention regarding the requirement as to consultation with the financing bank contemplated by section 72 (6), in paragraph 8 of the counter-affidavit it has been stated that the financing bank was consulted by sending a letter on 19th May, 1975. It is not the first respondent's case that he received any communication from the financing bank in answer to the said letter. Even if it is taken that the first respondent sent a communication to the financing bank that will not be sufficient to satisfy the requirement as to consultation. Perhaps realising this position the first respondent has taken the stand in the counter-affidavit that the consultation is required only for the passing of the order of supersession and not for issuing show cause notice. Mr. N.C. Raghavachari the learned counsel for the petitioner contends that having regard to the language of section 72 (6) the first respondent has to consult the financing bank before taking any action under section 72 (1) including the action of issuing the show cause notice, that by issuing the show cause notice the first respondent had initiated the proceedings under section 72 (1) and that for such initiation of the proceedings the consultation with the financing bank is necessary.

4. But on a due consideration of the matter, I am inclined to think that, having regard to the object of the provision under section 72 (6) which requires the consultation of the financing bank, such consultation is necessary before the final order is passed under section 72 (1). At the stage of the issue of the show cause notice no one knows as to what is going to happen ultimately. It is only when the first respondent makes up his mind after due enquiry in relation to the irregularties referred to in the show cause notice, the financing bank has to be consulted with regard to the action proposed to be taken. If the consultation is before the issue of show cause notice and if the first respondent ultimately finds that the irregularities referred to in the show cause notice have not been established, the consultation earlier obtained will become a mere formality and it would be a sheer waste of time. The matter is also clear if we consider the question of prejudice that will be caused to the petitioner. The petitioner can complain that the consultation has not been made only if the enquiry arising out of the show cause notice ultimately results in an order of supersession under section 72 (1). I am therefore of the view that consultation as contemplated by section 72 (6) is necessary before the final order is passed under section 72 (1) and not before the issue of show cause notice. This view finds support from the observation of Ramaprasada Rao, J., in *P.M.V. Credit Society* v. *Registrar of Co-operative Society*[1]. After holding that the consultation contemplated under section 72 (6) with the financing bank is pre-requisite for the exercise of the statutory power under section 72 (1) the learned Judge proceeds to observe as follows :

> "Obviously such consultation begins after the Registrar is subjectively satisfied on objective materials placed before him that a *prima facie* case has been made out for the purpose of superseding the co-operative society. It is only at that point of time that the necessity for consulting the financing bank arises. This has been held to be a mandatory requirement by the highest Court of the land. Such a consultation therefore cannot be avoided. Though consultation is not equivalent to con-

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1. (1973) 2 M.L.J. 200 at 202 : 86 .L.W. 494 : A.I.R. 1973 Mad. 460.

currence, yet there must be material on record to show that, after the Registrar entertained in opinion about the unsatisfactory working of a registered society, he should consult the financing Bank to whom the society is indebted, before he finally passes an order of supersession under section 72 of the Act."

5. As regards the contention that the show cause notice has been issued by the first respondent at the instance of the political opponents and that, it shows that he had already made up his mind, it is not possible to assume that the first respondent who is a statutory authority would stoop to hear the advice of the petitioner's political opponents and to initiate action under section 72 (1) without any basis. I am not therefore inclined to quash the show cause notice on the basis that the show cause notice has been issued *mala fide* or that the first respondent had a closed mind in relation to the irregularities alleged.

6. On the question as to whether the first respondent has shown any bias in the matter, it is not in dispute that there were certain writ petitions before this Court initiated by the petitioner against certain orders passed by the first respondent in relation to the affairs of this bank. The petitioner therefore apprehends that if the irregularities pointed out in the show cause notice were to be inquired into by the first respondent such enquiry may not be fair. Having regard to the said earlier proceeding between the petitioner and the first respondent it cannot be said that the said apprehension is not justified. In the circumstances of this case I consider that the further enquiry in relation to the show cause notice may have to be conducted by a different officer.

7. Regarding the next contention that the charges relate to a period prior to the present committee's taking charge on 18th May, 1974 and therefore those charges cannot be sustained, I consider that the matter should be urged before the concerned enquiry officer who will consider the tenability of this objection before passing the final orders in this matter.

8. With the above observations this writ petition is dismissed. However I consider that further proceedings under section 72 (1) will have to be conducted by some officer other than the officer who issued the show cause notice.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

H. A. Karim Sait (deceased) and others .. *Appellants**

v.

Myath Basha .. *Respondent.*

Lease—Building—Tenant sub-letting premises—Eviction petition on the ground of default in paying rent and of sub letting—Eviction ordered—Tenant leaving premises before order of eviction—Suit for arrears of rent—Tenant claiming that he had already vacated premises—Sub-lessees continuing in occupation—Tenant liable for rent.

A tenant vacated the premises in his occupation on 1st March, 1966 and informed the landlord sometime later; but he had sublet a portion of the premises and the sub-lessee continued in occupation. The landlord filed a suit against the tenant for arrears of rent, and claimed that there was no privity of contract between him and the sub-lessee.

Held, in the absence of any statutory right available to the sub-tenants to continue in the premises, it was necessary for the defendant (tenant) to have taken such steps as were possible or appropriate to see that the sub-tenants also vacated the premises. As he had failed to do so and as there was no privity of contract or estate between the landlord and the sub-tenants, the landlord could very well recover the money from the tenant defendant. There was no surrender of possession on the facts of the instant case which would in any way absolve the tenant from his liability to pay the rent. [*Para.* 12.]

* S.A. Nos. 795 of 1972, 1614 of 1972 and 1518 of 1973. *25th July*, 1975.

Cases referred to:

South of England Dairies Limited v. *Behar*, (1906) 2 Ch. 631 ; *Reynolds* v. *Bannerman*, (1922) 1 K.B. 719 ; *Harding* v. *Crathorn*, (1793) 1 Esp. 57 ; *Madurai Tayagamma* v. *Plantain Merchants Association*, (1968) 1 M.L.J. 386 : (1968) 81 Mad.L.W. 8 : I.L.R. (1968) 2 Mad. 376 ; *S.M. Abdul Jameel* v. *M/s. Simson and Machonochy Limited and others*, (1967) 1 M.L.J. 337.

Appeals against the decree of the Court of the Principal Civil Judge, Madras in Appeal Suit No. 292 of 1970 in A.S. No. 293 of 1970 and A.S. No. 29 of 1970 against the decree of the Court of the VIII Assistant City Civil Judge, Madras in Original Suit No. 1442 of 1967, O.S. No. 915 of 1968 and O.S. No. 290 of 1970 respectively.

A.N. Rangaswami and *B.S. Sathianarayanan*, for Appellant.

K. Venkateswara Rao and *G.R.S. Chandar Rao*, for Respondent.

The Court delivered the following

JUDGMENT.—These three appeals arise out of a common judgment of the principal Judge, City Civil Court, Madras, in the three appeals before him. The defendant in the trial Court was a tenant of the residential back portion in premises No. 3, Gopathi Narayanaswami Chetty Road, T. Nagar, consisting of 6 rooms, verandah and a hall on a monthly rent of Rs. 225 per mensem. Alleging that he had defaulted in payment of rent and had sub-let the premises without the consent of the landlord, proceedings under the House Rent Control Act were taken against him. The defendant remained *ex parte* and eviction was ordered. The plaintiffs took possession on 31st October, 1968, and three suits were filed for recovery of the rent from 1st April, 1967 to 31st October, 1968. The total amount claimed is Rs.2,025.

2. The defence was that the defendant had vacated the portion in his occupation on 1st March, 1966, that he had sent a notice to that effect on 25th March, 1966, and that he was not liable to pay any rent subsequent to 1st March, 1966. There are certain other allegations which are not material for our present purpose.

3. The Assistant Judge, City Civil Court who tried all the three suits together found that the defendant had surrendered tenancy on 1st March, 1966, and that direct relationship between the plaintiffs and the sub-tenants had come into existence so as to require them to proceed against them for damages for use and occupation of the premises. He, therefore, dismissed the suits.

4. The plaintiffs appealed to the principal Judge, City Civil Court, Madras. Before him it was contended that the trial Court had not paid any attention to Exhibit A-1 which is the certified copy of the notice dated 24th June, 1966, issued by the defendant to his sisters, who were the sub-tenants and that Exhibit A-1, would amount to an admission on the part of the defendant that he continued to be the tenant of the premises even subsequent to March, 1966. The sub-tenants had sent replies denying that they were the tenants of the defendant and claiming title to the property in their own rights. There were also some criminal proceedings between the defendant and his sisters and their husbands. Taking into account all these contentions and the circumstances, the learned Principal Judge held that the defendant's case that he surrendered tenancy on 1st March, 1965 was true and more probable than the case of the plaintiffs and that once he had surrendered the tenancy his liability to pay rent ceased. In his view the effect of the main tenant surrendering possession was to bring into existence direct relationship between the landlord and the sub-tenant and the landlord would have to recover amounts due to him for the period for which he was kept out of possession by the sub-tenants as damages for use and occupation. He, therefore, dismissed the appeals.

5. The unsuccessful plaintiffs have come on appeal to this Court. The contention urged on their behalf is that there is no privity of contract or estate between the plaintiffs, the landlords, and the persons who claimed to be sub-tenants from the defendant and that the mere intimation by the defendant that he had vacated the premises would not in any manner absolve him from his obligation to pay the rent so long as the actual possession of

the premises had not been handed over to the plaintiffs. For the respondent-tenant the submission was that once he had surrendered possession and had done all he could do to determine the tenancy, the plaintiffs could not proceed against him and had only to look to the occupiers for the amount, if any, due to them.

6. The short question that arises here is whether the intimation of surrender of possession by the main tenant with effect from 1st March, 1965 would absolve him from payment of rent from that date. It is not disputed that the plaintiffs at no time recognised the sub-tenants, as such, and, that the plaintiffs were only looking to the defendant for payment of rent. In Mulla on Transfer of Property Act, 1882, sixth edition at page 707 there is the following passage: —

> "In the case of a sub-lease the sub-lessee becomes a tenant of the lessee and does not stand in the lessee's place. Therefore, there is neither privity of estate nor privity of contract between the head lessor and the sublessee and a sub-lessee is not liable for rent nor on the covenants in the head lease to the head lessor."

This passage is based on the decision in *South of England Dairies, Limited* v. *Behar*.[1] In that case the lessee covenanted to pay one-third of the water rate payable in respect of the house, and the lessor covenanted to pay all rates and taxes except the water rate to the extent of one-third. The lessee sub-demised the premises and covenanted to pay one-third of the water rate payable in respect of the house. Subsequently the free-hold reversion and the superior lease become vested in the same person, a third party. He refused to pay any of the rates and taxes in respect of the said premises. The local authority distrained and the sub-tenants sought to recover from the owner the amount which they had been compelled to pay the municipal authorities. It was held that the action by the sub-tenants should fail, as there was no privity between the parties and that an underlessee was not an "assign" of his lessor so as to be entitled to the benefit of a positive covenant entered into with the lessor. At page 638 it was observed as follows:—

> "It is really elementary that, as between the superior landlord and ... under-lessees, there was neither privity of contract nor privity of estate".

The learned Judge relied on a passage in Platt on Leases, Vol. I, 1847 Edition, page 102. The sub-tenants did not become the tenants of the plaintiffs and were not liable to pay the rent to them in this case.

7. The learned trial Judge has considered the decision in *Reynolds* v. *Bannerman*[1], and has taken the view that the tenant had done all he could do to give vacant possession so that he was not liable to the landlord for use and occupation of the premises for the period during which the landlord was kept out of possession. In that case one Bannerman took certain premises on lease from Reynolds for a period of three years with an obligation to quit after six months' notice. Bannerman sublet a portion of the premises to Mrs. Baldwin on a weekly tenancy. In September, 1919, Bannerman gave due notice to quit on 25th March, 1920, this being the six months' notice. Bannerman went out of possession on 25th March, 1920; but Mrs. Baldwin refused to do so, relying on the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act then in force. She continued in occupation, paying rent neither to the landlord nor to Bannerman. She gave up possession in August, 1921. The landlord brought a suit against Bannerman claiming the rent or damages for use and occupation for the period from 25th March, 1921. The learned Judges adverted to the sub-tenant remaining in possession after the tenant had gone out by virtue of his statutory right which could not in any way be interfered with by the tenant. At page 724 it was observed as follows:—

> "But in the case we are considering there was nothing more that the tenant could have done to get possession of the premises for the landlord and the thing which prevented him from doing so was the statute."

1. (1906) 2 Ch. 631.

1. (1922) 1 K.B. 719.

It was further added in the same page as follows:—

"the mere fact that a person is in possession who has originally got possession as a sub-tenant, does not prevent the interest of the tenant ceasing at the expiration of his notice to quit."

At page 723 Acton, J., has pointed out as follows:

"......... having regard to the rights conferred on the sub-tenant by the statute it cannot be said that the tenant by any agency, or by any reason of any circumstances for which he is responsible, has put Mrs. Baldwin into these premises or suffered her to use and occupy them."

The above passages clearly show that as soon as the main tenant had surrendered possession to the extent possible by him, the tenancy was at an end and that the sub-tenant acquired the statutory rights which the tenant was powerless to put an end to. The principle of the sub-tenant acquiring certain statutory rights is indeed an exception to the principle that:

"When a lease has expired, the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term."

(In the words of Lord Kenyon in *Harding* v. *Crathorn*[1]).

8. So long as similar statutory right has not been conferred on the sub-tenant under the Indian Law, it will not be proper to import the principle of the decision in *Reynolds* v. *Bannerman*[2].

In Hill and Redman's law of Landlord and Tenant, fifteenth edition page 501, the main principle and the exception thereto are set out as follows:—

"While an underlessee wrongfully remains in occupation, the lessor can treat the lessee as still in possession, and can recover rent from him for the period of the underlessee's occupation, but if the underlessee is entitled to remain in possession by virtue of the protection afforded by the Rent Act, 1968 and the tenant has done all that lies in his power to give vacant possession, he will not be liable for rent or for the use and occupation of the premises during the continuance of the underlessee in possession."

For the main principle, *Harding* v. *Crathorn*[1] is relied on and for the exception *Reynolds* v. *Bannerman*[2], has been cited. I have excluded, in extracting this passage, the other decision to which reference has been given in the text.

9. The fact that the sub-tenants in India have no statutory rights is clear from a Bench decision of this Court in *Madurai Tayagamma and others* v. *Plantain Merchants Association*[3]. An order of eviction was passed against a chief tenant. The sub-tenant had not been impleaded in the proceedings. The question was whether the order could be executed by evicting the sub-tenants. It was held that the order of eviction obtained against the chief tenant could be executed by evicting the sub-tenant, who were not parties to the eviction proceedings. Therefore, in my opinion, there is no scope for applying the principle of *Reynolds* v. *Bannerman*[2], to the Indian sub-tenant.

10. My attention was drawn to a decision in *S.M. Abdul Jameel* v. *Messrs. Simson and Machonochy Limited and others*[4], In a suit on the Original side of this Court the plaintiff was the owner of a building called 'Badshaw Buildings'. He had let it out to the first defendant for a period of ten years from 1st January, 1954 on a monthly rent of Rs. 1,750 for the entire premises. The lessee had power to sub-lease and he (the first defendant) sub-leased a part of the property to defendants 2 and 3 in the suit. Though the lease had come to an end by 31st December, 1963, the tenant obtained permission to continue in the premises upto 30th April, 1964. As the sub-tenants had not vacated even after that date, the landlord filed a suit

1. (1793) 1 Esp. 57.
2. (1922) 1 K.B. 719.

1. (1793) 1 Esp. 57.
2. (1922) 1 K.B. 719.
3. (1968) 1 M.L.J. 386 : (1968) 81 Mad.L.W. 8 : I.L.R. (1968) 2 Mad. 376.
4. (1967) 1 M.L.J. 387.

seeking to recover possession of the portions in the occupation of the sub-tenants and also claiming damages for use and occupation. Ramamurti, J., gave a decree for possession of the property in the occupation of the sub-tenant and a decree for mesne profits recoverable from him. In the course of his judgment at page 343 the learned Judge observed as follows:

> "It has been held that if the main tenancy is determined and if the landlord gives the sub tenant notice of this termination as well as the notice terminating the sub-tenancy the fact that the sub tenant remains in possession claiming to be a statutory tenant will not render the tenant liable for rent or damages for use and occupation as the main tenant must be held to have done everything legally possible to give the landlord vacant possession."

He relied in this connection on Woodfall on Landlord and Tenant, 26th Edition, page 1042 and also referred to the decision in *Reynolds v. Bannerman*[1].

11. The above passage, in my opinion does not take note of the difference in the legal position between the sub-tenant and the owner. Further the question in the form in which it is before me did not come up for decision. In fact, the learned Judge has adverted to a concession (at page 344) made by the tenant in that case to the right of the landlord to recover possession, provided the landlord gave up the claim for mesne profits as against the tenant. If the liability of the tenant to pay rent or mesne profits had been in issue, there would have been scope for application of the principles deduced by me. As this question did not arise there, I am unable to regard that decision as deciding the point in issue here.

12. The notice issued by the defendant on 25th March, 1966, cannot also be taken as a surrender of possession. In the absence of a statutory right to the sub-tenants to continue in the premises as in the English law, it was necessary for the defendant to have taken such steps as were possible or appropriate to see that the sub-tenants vacated the premises. As he has failed to do so and as there is no privity of contract or estate between the landlord and the sub-tenants, the landlord could very well recover the money from the tenant-defendant. By merely alleging that he had delivered the key with reference to the portion in his occupation, the tenant cannot be said to have taken steps to see that the sub-tenants were kept out of the premises so as to enable the landlord to take possession. Even on the question as to whether there has been a surrender of possession by the tenant on 1st March, 1966, there is some scope for doubt. If really he had delivered possession on 1st March, 1966, it is not clear as to why it became necessary for him to issue the notice on 25th March, 1966. By a reply dated 29th March, 1966, the landlord has denied the delivery of possession by the tenant. This goes to show that there was no actual surrender of possession. I am not satisfied that there has been surrender of possession on the facts herein, which would in any way absolve the tenant from his liability to pay the rent. It is not necessary to pursue this point further, and I have reached a conclusion against the defendant even on the view that he had vacated on 1st March, 1968.

13. For all these reasons the Courts below went wrong in holding that the defendant was not liable for the rent from 1st March, 1955 upto 30th October, 1965. There will be a decree as prayed for with costs throughout. Leave granted.

S.J. —————— *Appeals allowed.*

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1. (1922) 1 K.B. 719.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

St. Francis Xaviers' Church by its present Parish Priest Rev. Father Joseph Sandanam .. *Appellant**

v.

Varalakshmi Ammal and another .. *Respondents.*

Registration Act (XVI of 1908), section 17 (2) (vi)—Compromise decree between landlord and tenant—Land forming part of a Church—Suit for eviction—Compromise providing for lease of the land to tenant for 21 years or a specified rent—Agreement not registered—Effect—Suit for eviction before expiry of term—Plea of part performance—Plea not raised in written statement—Cannot be raised in Second Appeal—Transfer of Property Act (IV of 1882), section 53-A.

A compromise decree is, in reality, nothing more than a contract of parties with the command of a judge super-imposed on it. A compromise decree also must satisfy the requirements of law relating to contracts. [*Para.* 6.]

The exemption from registration under section 17 (2) (*vi*) of the Registration Act would not extend to leases of immoveable property from year to year or for any term exceeding one year or reserving an yearly rent referred to in section 17 (1) (*d*). [*Para.* 7.]

Even if the compromise decree was to be construed as an agreement to lease, it would nevertheless attract the provisions of the Stamp Act, even though it contained a stipulation that a formal lease deed was to follow. [*Para.* 9.]

In the instant case, under the compromise decree, the execution of the lease deed was not a contingency which postponed the coming into operation of the lease agreement between the parties or the lease taking effect. Only if the lease taking effect was beyond the contingent event can it be said that the agreement was inchoate and it did not create a current lease in favour of the lessee. In the circumstances of this case, the plaintiff's suit for possession was not premature. [*Para.* 10.]

A defence under section 53-A of the Transfer of Property Act involves questions of fact and consequently, the party wishing to set up such a defence ought to lay the requisite foundation for it in his pleadings as well as in his evidence. A defence under section 53-A of the Transfer of Property Act could not be allowed to be raised for the first time in Second Appeal because it raised questions of fact which should have been put in issue at the trial. [*Para.* 11.]

Cases referred to :—

Habib Mian v. *M. Ahmad*, A.I.R. 1969 All. 296 ; *Venkata Subba Rao* v. *Jagannadha Rao*, (1964) 2 M.L.J. (S.C.) 112 ; *Kasim Marakkayar* v. *Muhammad Abdul*, I.L.R. (1944) Mad. 543 : (1944) 1 M.L.J. 230 : 57 L.W. 165 (2) : A.I.R. 1944 Mad. 273 (F.B.) (2) ; *Jagdish Chandra Deo* v. *BiseswarLal*, A.I.R. 1942 Pat. 323 ; *Mangan Lal* v. *Md. Motinul Huque*, A.I.R. 1951 S.C. 11 ; *Daulat Ram* v. *Haveli Shah*, A.I.R. 1939 Lah. 49 ; *Md. Mohideen Ambalam* v. *Rajah of Ramnad*, (1958) 71 L.W. 44 ; *Nanda Ram* v. *Apcar Collieries Limited*, A.I.R. 1963 Cal. 636 ; *Mopurappa* v. *Ramaswami*, A.I.R. 1934 Mad. 418 ; *Manjit Singh* v. *J. P. Tarabala*, A.I.R. 1971 J. & K. 86 ; Under the Indian Stamp Act, 1879, section 46, I.L.R. (1894) 17 Mad. 280 : (1894) 4 M.L.J. 104 ; *Murlidhar* v. *Mt. Tara Dye*, A.I.R. 1953 Cal. 349 ; *Hadu Maharana* v. *Ramdulal*, A.I.R. 1944 Pat. 35 ; *Seraj I Haque* v. *Durjendra Mohan*, A.I.R. 1941 Cal. 33 ; *Sailajananda Pandey* v. *Lakhichand Sao*, A.I.R. 1951 Pat. 502 ; *Sundareswarar Devasthanam* v. *Marimuthu*, I.L.R. (1963) Mad. 1054 : 76 L.W. 381 : A.I.R. 1963 Mad. 369 ; *M. H.K. Ashwarkhana* v. *Maniyanna Naicker*, (1973) 1 M.L.J. 74 : 86 L.W. 549 : A.I.R. 1974 Mad. 145 ; *Baluswami Aiyar* v. *Lakshmana Aiyar*, I.L.R. 44 Mad. 605 : 41 M.L.J. 129 ; A.I.R. 1921 Mad. 172 ; *Venkata Rao* v. *Satyanarayanamurthy*, (1943) 2 M.L.J. 336 : I.L.R. (1944) Mad. 147 : A.I.R. 1943 Mad. 698 ; *Siva Pershad Moria* v. *Swarajyalakshmi*, (1959) 2 An.W.R. 452 : (1960) An.L.T. 90 ;

* S.A. No. 398 of 1972.

8th September, 1975.

Ashabhai Patel v. *Dabhi Fulsinji*, (1965) 1 S.C.R. 712 : A.I.R. 1965 S.C. 669 ; *Virdhachalam Pillai* v. *Chaldean Bank*, (1964) 5 S.C.R. 647 : A.I.R. 1964 S.C. 1425 ; *Natesa Mudaliar* v. *Bavanarayanaswami Koil*, (1966) 79 L.W. 133.

Appeal against the Decree of the City Civil Court (II Additional Judge), Madras dated 7th April, 1971 in Appeal Suit No. 132 of 1970 preferred against the Decree of the City Civil Court (I Assistant Judge) Madras in Original Suit No. 1740 of 1966.

S. K. Ahmed Meeran and *A. Abdul Hadi*, for Appellant.

J. Nagarajan, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, who has failed before the trial Court and the lower appellate Court in his action for recovery of possession of the suit site, is the appellant herein. As may be seen from the cause-title, the plaintiff is a Church, and the suit was instituted against four persons, of whom the first and fourth defendants alone are respondents herein, for recovery of possession of a site measuring 45′ x 47′ in Survey No. 2306/1 in St. Xavier Street, Madras. On the suit site the first respondent's father had put up a superstructure and it would appear to bear municipal door number 2/2. The second respondent is alleged to be a sub-lessee under the first respondent, the other two sub-lessees *viz.*, defendants 2 and 3, being reported to have since vacated the premises. On the ground that the suit property was a part of the Church and hence *rés extra commercium*, the appellant terminated the tenancy of the first respondent by notice, dated 16th November, 1965 and this was followed by a suit when possession was not surrendered.

2. The defence of the first respondent was that the suit site had been taken on lease by her father Varadarajulu Naidu fifty years ago, and, in ejectment proceedings instituted by the appellant, there was a compromise in C.C.C.A. No. 32 of 1951 on the file of this Court, wherein it was specifically agreed that the appellant should enter into a registered lease with the first respondent for leasing the site for a period of twenty-one years at the enhanced rent of Rs. 30 per mensem as against the original rent of Rs. 15 per mensem. The period of twenty-one years not having expired, the first respondent challenged the suit as premature. Secondly, it was contended that the lease would be governed by the City Tenants' Protection Act and therefore, the first respondent was entitled to rights and benefits conferred on her as a tenant by the said Act. The second respondent sailed with the first respondent and contended that he was a sub-lessee to the knowledge of the appellant and the suit for ejectment was not maintainable.

3. The first respondent followed her written statement with an application under section 9 of the Tamil Nadu City Tenants' Protection Act for the relief of having the suit site valued and sold to her at the rate fixed by the Court.

4. The trial Court rejected the claim of the first respondent that she was entitled, under the City Tenants' Protection Act, to have the suit site sold to her on the ground that the site formed an integral part of the Church and was, therefore, *res extra commercium*. It, however, sustained the first ground of defence, *viz.*, that in view of the compromise decree passed in C.C.C.A. No. 32 of 1951, the first respondent was entitled to be in possession of the site for a period of twenty-one years from the date of the decree and consequently, the suit was premature. In that view of the matter, it dismissed the appellant's suit. The appeal to the Second Additional City Civil Judge, Madras, by the appellant also ended in failure since the lower appellate Court concurred with the view of the trial Court that the suit was premature. It is in these circumstances, the appellant has come forward with this second appeal.

5. Mr. Abdul Hadi, learned counsel for the appellant, would urge that the Courts below have committed an error of law in admitting in evidence Exhibit B-5 which is a certified copy of the decree in C.C.C.A No. 32 of 1951, and holding, on the terms contained in Exhibit B-5, that the suit was premature. The contention of the learned counsel was that the compromise decree created leasehold rights in favour

of the first respondent and therefore required registration before it could be admitted in evidence. To appreciate the point urged by the learned counsel, it is necessary to extract the terms found in the compromise decree :

"(1) That the appellant herein (plaintiff) shall grant a registered lease in favour of the 1st respondent herein (1st defendant) at the cost of the 1st respondent herein (1st defendant) for a period of 21 years in respect of the suit land described in the schedule to the plaint.

(2) That the 1st respondent herein (1st defendant) shall pay to the appellant herein (plaintiff) a sum of Rs. 30 (Rupees thirty only) per mensem by way of rent for the suit land as from the date of this decree and that the same shall be payable regularly on or before the 5th of each month.

(3) That the 1st respondent herein (1st defendant) shall pay to the appellant herein (plaintiff) the arrears of rent due at the old rate of Rs. 15 (Rupees fifteen only) per mensem upto this date.

(4) That the 1st respondent herein (1st defendant) shall vacate and deliver possession of the suit land to the appellant herein (plaintiff) on the expiry of the said period of twenty-one years and that the 1st respondent herein (1st defendant) shall be entitled to remove his superstructure or, by mutual consent, the superstructure may be valued and that if the 1st respondent (1st defendant) be willing to sell the same the appellant herein (plaintiff) shall be at liberty to purchase the same for a reasonable price, agreed to between the parties.

(5) That the appellant herein (plaintiff) shall not be entitled to increase the rent during the subsistence of the lease ; and

(6) That the 1st respondent herein (1st defendant) shall not be entitled to any benefits of the Madras City Tenants Protection Act."

From the extract given above, it may be seen that an agreement was entered into between the appellant on the one hand and the 1st respondent's father Varadarajulu Naidu, who was the first defendant in the earlier suit, on the other, whereby the appellant *inter alia* agreed to Varadarajulu Naidu being the lessee of the suit site for a period of twenty-one years and, in turn, Varadarajulu agreed to pay enhanced rent at the rate of Rs. 30 per mensem from the date of the decree. Undoubtedly, the compromise decree has all the trappings of a demise *in presenti* to wit, a lease. Mr. T. S. Subramaniam, learned counsel for the respondents, strenuously contended that Exhibit B-5 ought not to be construed as an instrument purporting or operating to create any fresh right in favour of Varadarajulu Naidu. The plea of Mr. Subramaniam was that, since Varadarajulu Naidu was already in possession of the site as a lessee Exhibit B-5 did nothing more than recognise his rights to be in possession thereof for a further period of twenty-one years and only minor variations were made in the terms of the pre-existing lease such an enhancement of rent from Rs. 15 to Rs. 30 per mensem and the mode of discharge of the arrears of rent. This contention is clearly devoid of substance and the gloss sought to be put on the recitals contained in the compromise decree will be doing violation to the letter and spirit of the document. As already stated, the compromise decree contains within itself all the terms and conditions of a lease deed, it is a document entered into between the lessor and the lessee, the period of the lease is mentioned, the rate of rent has been fixed and there is also reference to the liability of the lessee to deliver possession of the leased site at the end of the stipulated period of twenty-one years. Even with regard to the superstructure put up by the lessee, there is provision in the compromise decree as to what was to happen to it at the end of the lease period. Lastly, whatever may be the operative force of the clause, there is also a stipulation in the compromise decree that the lessee will not be entitled to any benefit under the City Tenants Protection Act. These features unmistakably go to establish that Exhibit B-5 was intended to create a lease of the suit site for a period of twenty-one years from the date of the agreement, and can never be construed

as a document bereft of the characteristics of a lease deed.

6. Before proceeding to consider the argument of the appellant's counsel that since the compromise decree was in the nature of a lease deed it required registration, it must be remembered that a compromise decree is, in reality, nothing more than a contract of parties with the command of a Judge superimposed on it. Vide : *Habib Main* v. *M. Ahmad*[1] and *Venkata Subba Rao* v. *Jagannadha Rao*[2] Once this is realised, it necessarily follows that a compromise decree must also satisfy the requirements of law relating to contracts if the compromise is sought to be enforced or is offered in defence.

7. Turning, new, to the contention of Mr. Abdul Hadi that in the absence of registration Exhibit B-5 is not admissible in evidence, it must be noted that section 17 (2) (*vi*) of the Indian Registration Act which exempts any decree or order of Court (except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the proceeding) from registration will have application only to documents of demise specified and enumerated in clauses (*a*) and (*b*) of section 17 (1) of the Registration Act. The exemption would not extend to leases of immoveable property from year to year or for any term exceeding one year or reserving an yearly rent referred to in section 17 (1) (*d*). This position of law is well-settled and I need make reference only to a few decisions on this aspect. A Full Bench of this Court in *Kasim Marakkayar* v. *Muhammad Abdul*[3], decided that though a lease is, no doubt, a non-testamentary instrument which operates to create a right in immoveable property, a compromise which operates as a lease is not exempt from registration under sub-section (2) (*vi*) of section 17, as that sub-section only exempts decrees and orders which fall within clauses (*b*) and (*c*) of sub-section (1) and has no application to leases which fall under clause (*d*). *Jagdish Chandra Deo* v. *Biseswar Lal*[1], also laid down that if a compromise decree amounts to a present demise of property, the document is inadmissible without registration. This ratio was affirmed by the Supreme Court in *Mangan Lal* v. *Md. Moinul Huque*[2], though the Court held, with reference to the facts of that case, that since the contemplated under lease therein was to take effect only on a contingent event, the compromise decree projected for consideration did not fall within section 17 (1) (*d*). Mr. T.S. Subramaniam relied on *Daulat Ram* v. *Haveli Shah*[3], *Md. Mohideen Ambalam* v. *Rajah of Ramnad*[4] and *Nanda Rani* v. *Apcar Collieries Limited*[5] to contend that when a decree embodging the terms of a contract did not create or declare a fresh lease, it would not fall within section 17 (1) (*d*) of the Registration Act and therefore, it would not require registration. The stand of the learned counsel for the respondents cannot be countenanced, for, the argument proceeds on the erroneous basis that Exhibit B-5 did not, in terms, create a fresh lease and was only intended to secure continuation of an already existing lease. The enhancement of rent from the date of the decree as well as the undertaking by the lessee that he would not claim benefit under the City Tenants Protection Act are tell-tale features and go to show that, whatever rights and relationship the parties had with one another prior to that date, those rights were put an end to and fresh rights and obligations were created as and from the date of the compromise decree.

8. In his bid to establish that Exhibit B-5 did not, by itself, create leasehold rights in favour of Varadarajulu Naidu, Mr. Subramaniam contended that clause (1) of Exhibit B-5 provided that the appellant had to grant a registered lease deed and, as long as that had not been complied with, Exhibit B-5 must be deemed to be an inchoate instrument of lease. In this context, it must be stated

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1. A.I.R. 1969 All. 296.
2. (1964) 2 M.L.J. (S.C.) 112.
3. I.L.R. (1944) Mad. 543 : (1944) 1 M.L.J 230 : 57 L.W. 165 (2) : A.I.R. 1944 Mad. 273 (F.B.).

1. A.I.R. 1942 Pat. 323.
2. 1951 S.C.J. 9 : 1950 S.C.R. 833 : 64 L.W. 350 : A.I.R. 1951 S.C. 11.
3. I.L.R. 1939 Lah. 49.
4. (1958) 71 L.W. 44.
5. A.I.R. 1963 Cal. 636.

that though Exhibit B-5 provided for a registered lease deed being executed by the appellant, such a deed was not executed, and much less registered. On that score, however, the respondents cannot be heard to say that Exhibit B-5 was an inchoate instrument and did not create a lease *in praesenti* from the date of the decree. The execution of a registered lease deed was a mere formality and did not, in any way, retard or postpone the lease envisaged under Exhibit B-5 coming into operation. It is common ground that Varadarajulu Naidu, the lessee under Exhibit B-5, admitted liability and started paying rent at the rate of Rs. 30 per mensem from the date of the compromise. Possession of the leased site was admittedly with him and therefore, the clause relating to the execution of a registered lease deed was only an innocuous provision. A Full Bench of this Court considered in *Mopurappa* v. *Ramaswami*[1], whether an understanding between parties that a formal lease deed was to be executed later had the effect of taking an oral agreement for lease outside the scope of section 107 of the Transfer of Property Act. The Full Bench held that the oral agreement, notwithstanding the understanding to have a formal deed executed later, amounted to a lease. The ratio in this case was followed in *Manjit Singh* v. *J. P. Jarrawala*[2], and it was held that a document, whereunder all the terms relating to lease had been settled, created a demise *in praesenti* notwithstanding that a formal lease was to be executed later on. In such circumstances, the respondents cannot be heard to say that the lease contemplated under Exhibit B-5 did not come into force as a formal lease deed had not been executed in terms of the compromise.

9. Digressing for a moment, even if Exhibit B-5 were to be construed as an agreement to lease, and not a lease deed by itself, it must, nevertheless, suffer the incidents of stamp-duty and registration. An agreement to lease is also included in the word "lease" under the Indian Stamp Act. But, in order to make such a document chargeable with stamp-duty as an agreement to lease or lease deed, the document must show the creation of an actual and present demise which should not be contingent on the happening of a certain event or the doing of a certain future act. Judged by these standards, there can be no difficulty in holding that Exhibits B-5, even if it were to be construed as an agreement to lease, did create a present and actual demise. In similar circumstances, Courts have held that an agreement to lease did attract the provisions of the Stamp Act, even though it contained a stipulation that a formal lease deed was to follow. On a *Reference under the Indian Stamp Act*, 1879, *section* 46[1], a Full Bench of this Court held that an agreement for lease must be stamped as such notwithstanding that another instrument was intended to be executed. To the same effect is the decision in *Manjit Singh* v. *J. P. Jarrawala*[2].

10. The Courts below have unfortunately held that the compromise decree did not confer a leasehold right on Varadarajulu Naidu as the decree provided for the execution of a formal lease deed in terms of the decree. The execution of the lease deed was not a contingency which postponed the coming into operation of the lease agreement between the parties or the lease taking effect. Only if the lease taking effect was beyond the contingent event can it be said that the agreement was inchoate and it did not create a current lease in favour of the lessee. The view taken by the Courts below is not in accordance with law and therefore, the dismissal of the suit as premature cannot be sustained.

11. On behalf of the respondents, a proposition was advanced that, in any event, the respondents are entitled to be in possession of the leased site for the stipulated period in accordance with the doctrine of part performance. According to the respondents, even if the compromise decree required registration and was, therefore, not admissible in evidence, the non-registration of the decree could not affect their right to be in possession of the site for a period of twenty-one years

1. A.I.R. 1934 Mad. 418.
2. A.I.R. 1971 J. & K. 86.

1. (1894) I.L.R. 17 Mad. 280 : 4 M.L.J. 104 (F. B.).
2. A.I.R. 1971 J. & K. 86.

as they had been inducted into possession of the site in part performance of the agreement and they were therefore entitled to resist the appellant's suit as a premature action. In support of this contention, reliance was placed on *Muralidhar* v. *Mt. Tara Dye*[1] and *Hadu Maharana* v. *Ramdulal*[2]. In both these cases it has been held that even in cases where a lease deed is inadmissible in evidence on account of its non-registration or some such defect, the tenant would, nevertheless, be entitled to have the deed admitted in evidence to prove the nature and character of his possession if he had been put in possession of the leased property in part performance of the agreement of lease. Whatever may be the merit of this contention, the respondents cannot be allowed to raise this plea because they have not laid the foundation for it in the pleadings or in the evidence. It is needless to say that a defence under section 53-A of the Transfer of Property Act involves questions of fact and consequently, the party wishing to set up such a defence ought to lay the requisite foundation for it in his pleadings as well as in his evidence. As has been pointed out in *Serajul Haque* v. *Dwijendra Mohan*[3] and *Sailajananda Pandey* v. *Lakhichand Sao*[4], a defence under section 53-A of the Transfer of Property Act cannot be allowed to be raised for the first time in second appeal because it raises questions of fact which should have been put in issue at the trial.

12. Yet another ground on which Mr. Subramaniam attempted to sustain the judgment of the Courts below was that the first respondent was entitled to benefits conferred on tenants under the City Tenants Protection Act and therefore, the appellant was not entitled to recover possession of the site. This contention is clearly untenable for more than one reason. Firstly, the contention proceeds on the basis that the provisions of the City Tenants Protection Act would apply to the facts of the case. As has already been stated, the trial Court rejected the case of the first respondent in this behalf on the ground that the leased site formed part of the Church and was, therefore, *res extra commercium*. It must be remembered that it is not every lease of a vacant site that would entitle a tenant to ask for a sale of the site whereon he had put up a superstructure, under the provisions of the City Tenants Protection Act. Leases of certain clases of site, as pointed out by a Bench of this Court in *Sundareswarar Devasthanam* v. *Marimuthu*[1], will fall outside the scope of the City Tenants Protection Act. To that class belongs the site of a temple or church or mosque, its building and appurtenances as they would be *res extra commercium*. In an attempt to get over the situation Mr. Subramaniam placed reliance on *M. H. K. Ashurkhana* v. *Maniyanna Naicker*[2], wherein V. Ramaswami, J. has held that tenancies of lands owned by wakfs or trusts or endowments are not excluded from the operation of the Tamil Nadu City Tenants Protection Act. This contention overlooks the fact that the 1st respondent's claim for protection under the Act has not been negatived on the general ground that the site belonged to a church, but only on the specific ground that the site formed part of the appellant Church itself. This finding is one of fact and it cannot now be disturbed in the second appeal. It is, no doubt, true that the lower appellate Court has not given its pronouncement as to whether it concurred with the finding of the trial Court in this behalf. But, it is clear from the judgment that the respondents themselves did not canvass the correctness of this finding before the lower appellate Court. In such circumstances, it must be held that the finding has become conclusive and cannot be re-agitated in second appeal.

13. The second fallacy committed by the respondents in invoking the provisions of the City Tenants Protection Act to their aid is that they have not kept open their claim, but, on the other hand, have allowed it to abate. Mr. Subramaniam, however, contended that under Order 41, rule 22 of the Code of Civil Proce-

1. A.I.R. 1953 Cal. 349.
2. A.I.R. 1944 Pat. 35.
3. A.I.R. 1941 Cal. 33.
4. A.I.R. 1951 Pat. 502.

1. I.L.R. (1963) Mad. 1054 : 76 L.W. 381 : A.I.R. 1963 Mad. 369.
2. (1973) 1 M.L.J. 74 : 86 L.W. 549 : A.I.R. 1974 Mad. 145.

dure, a respondent in an appeal is entitled to support the judgment of the Courts below on all grounds including those that were not approved by the trial Court or the lower appellate Court. In support of this contention, reliance was placed on *Baluswami Aiyar* v. *Lakshmana Aiyar*[1], *Venkata Rao* v. *Satyanarayanamurthy*[2], *Siva Pershad Moria* v. *Swarajyalakshmi*[3], *Ashabhai Patel* v. *Dabhi Fulsinji*[4] and *Virdhachalam Pillai* v. *Chaldean Bank*[5]. These authorities can have no application to the facts of the case. It must be remembered that a tenant wishing to exercise and enforce his rights under the City Tenants Protection Act has to file an application under section 9 of the Act to have the site, whereon he had put up a superstructure, valued by the Court and made available to him for purchase. Such an application was made by the first respondent before the trial Court and when that application was dismissed on account of the Court holding that the leased site formed part of the Church and was therefore not alienable, the first respondent did not challenge the correctness of the finding and prefer a civil miscellaneous appeal to the lower appellate Court. Having failed to do so, the first respondent cannot be heard to contend that she is still entitled to invoke the provisions of the City Tenants Protection Act to her aid in defending the suit for ejectment. This is not a case where the defence projected by the respondents was of a general nature, but it was of a special nature and for which a specific procedure had been laid down under the Act. Having failed to keep alive the collateral proceedings, the first respondent cannot be heard to say that she can rely upon the provisions under Order 41, rule 22 of the Code of Civil Procedure and attempt to substantiate the judgment of the Courts below on the disallowed ground as well.

1. I.L.R. 44 Mad. 605 : 41 M.L.J. 129 : A.I.R. 1921 Mad. 172.
2. (1943) 2 M.L.J. 336 : I.L.R. (1944) Mad. 147: A.I.R. 1943 Mad. 698 (F.B.).
3. (1959) 2 An.W.R. 452 : (1960) An.L.T. 96.
4. (1965) 1 S.C.R. 712 : A.I.R. 1965 S.C. 669.
5. (1964) 5 S.C.R. 647 : A.I.R. 1964 S.C. 1425 at 1438.

In any event, even if the respondents are entitled to challenge, in this appeal, the correctness of the finding of the trial Court that the leased site was *res extra commercium*, it must still be held, as pointed out in *Natesa Mudaliar* v. *Bavanarayanaswami Koil*[1], that the finding on this aspect was a question of fact and cannot, therefore, be traversed in second appeal.

14. In the result, it is seen that the judgments of the Courts below cannot be sustained and the appellant-plaintiff is entitled to succeed in his suit for ejectment. The second appeal will, therefore, stand allowed and the appellant's suit for recovery of vacant possession of the plaint schedule land will stand decreed. Both parties will bear their respective costs throughout. No leave. The respondents are given three months' time to vacate the suit site.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—*V. Ramaswami, J.*

The Chairman, Bank of Madura Ltd., 33, North Chitrai Street, Madurai-1 ..*Petitioner**

v.

The Presiding Officer, Industrial Tribunal, Madras, having his office at the New City Civil Court Buildings High Court Compound, Madras-1 (Constituted by the Central Government) and others

Respondents.

Industrial Dispute—Bank—Appointment of apprentice-clerks—Apprentice-clerks doing normal work—Stipend much less than regular pay—Work done similar to permanent staff—Recruitment, if amounts to unfair labour practice.

The Bank of Madura appointed a large number of apprentice-clerks to meet

1. (1966) 79 L.W. 133.
* W.P. No. 1767 of 1974.

26th September, 1975.

the need of additional work due to growth in work. The apprentices were on probation for a period of one year. A graduate apprentice was paid a stipend of Rs. 150 a month and a non-graduate was paid Rs. 100 a month. But the work carried out by them was equal to that of permanent clerks. The employees' union contended that the management was indulging in unfair labour practice by recruiting employees on one-third of the starting salary payable to an employee of the Bank and that this was in violation of the various Bank Awards and Settlements in the Banking Industry. On a dispute referred to the Labour Court it was held that the Bank's action amounted to unfair labour practice. To quash this award, the Bank filed this petition.

Held. When a need arises for appointment of more staff to meet the increased volume of work, that could only be treated as permanent vacancies. If in temporary situations additional staff are employed they may be treated as temporary staff. But if the increase of work is fairly permanent, in that it is expected to continue for quite a long time the need for appointment could be considered only on a permanent basis and no apprentices could be appointed for such vacancies. [*Para.* 8.]

Held on facts, that the Bank resorted to the method of appointing apprentices in the instant case with a view to get cheap labour, amounting to unfair labour practice. There could be no doubt that if an employer, with the object of depriving an employee of his legitimate dues, appointed a person in a permanent post as an apprentice and paid him less, it would amount to unfair labour practice. [*Para.* 8.]

Case referred to :

Eveready Flash Company v. *Labour Court, Bareilly and others*, (1961) 2 L.L.J. 204.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 1 of 1973 on the file of the Industrial Tribunal, Madras (Constituted as Tribunal by the Central Government) and quash the Award passed therein and dated 26th April, 1974.

M. R. Narayanaswami and *S. Jayaraman*, for Petitioner.

A. L. Somayaji, for Respondent No. 2.

The Court made the following

ORDER.—This is a petition for the issue of a writ of *certiorari*, to quash the award of the Industrial Tribunal, Madras in I.D. No. 1 of 1973. The dispute was between the employers of the Bank of Madura and their workmen and the dispute was referred by the Government of India in their order No. L. 12011/19-72-LR-III dated 20th December, 1972. The petitioner Bank is one of the B-Class banks within the meaning of the Bank Awards. Some time in the beginning of 1972, the petitioner Bank held an examination for recruitment of about 400 apprentices. After the written examination, there was an oral examination conducted by three selection committees, each committee consisting of a member of the Board of Directors and two Officers of the Bank. Out of the 400 people called for interview, 385 candidates were selected, and orders of appointment were issued to them appointing them as apprentice-clerks in the Bank. Thirty-nine did not report and the rest of them reported for duty during the period from July, 1972 to December, 1972. Eight resigned some time later and the services of nine others were terminated. Thus, the total number of people employed as apprentice clerks amounted 329. Of these, some were graduates and the others had only passed the S.S.L.C. examination. In respect of these graduates—apprentice-clerks, the petitioner paid what is called a stipend of Rs. 150 per month and for the non-graduates—clerks a stipend of Rs. 100 was paid. The terms and conditions of appointment in respect of both these categories were the same except regarding the emoluments. It was stated in the order that the period of apprenticeship would be one year and that at the end of the apprenticeship period, if they were found suitable, they would be confirmed

and absorbed in the Bank's services, and that the decision of the Bank is this regard shall be final. It is stated that the suitability for confirmation and absorption would be based on conduct and manners, punctual attendance, regular attendance, co-operation with the other members of the staff, obedience to the orders of superiors, courteous service to the customers and the public, inclination, keenness and aptitude for banking service and learn bank work, and general enthusiasm and similar factors. How their work would be assessed is also mentioned in the order of appointment. The Bank of Madura Employee's Union, by their letter dated 21st June, 1972, addressed to the Regional Labour Commissioner (Central), Madras, protested against this appointment of apprentice-clerks and contended that the Management was indulging in unfair labour practice by recruiting employees on contract basis on a salary which is almost one-third of the starting salary payable to an employee of the Bank under the agreement signed by them and the Bank. They also contended that the action of the Bank was in violation of the Industrial Disputes Act and the various Bank Awards and Settlements in the Bank Industry. They pointed out that the starting pay of a clerk in a bank was to be Rs. 267 as against a sum of Rs. 100 proposed to be paid by the Management. They specifically charged that the Management's action was a naked attempt to exploit the unemployment situation in our country to recruit the un-employed educated youth on meagre wages and utilise them to defeat the bargaining power of their union. It is not necessary to refer to the other allegations in this petition as the learned counsel for the respondents did not rely on them. They further stated that since the Management was not willing for an amicable settlement the General Body of the Union passed a resolution on 4th June, 1972 and a copy of this resolution was also enclosed. The Assistant Labour Commissioner forwarded this letter and the resolution to the Chairman of the Bank of Madura, proposing to hold a joint discussion to bring about an amciable settlement of the disputes. In this letter, the Labour Commissioner also requested the Bank to keep the proposed recruitment in abeyance till the disposal of the dispute. But, as already stated, the Bank issued the orders of appointment and the apprentices joined their duty from July onwards up till December, 1972. The Union filed another petition dated 29th June, 1972 before the Labour Commissioner, in which they stated that in the case of recruitment of apprentices, the Bank was attempting to recruit persons to discharge the regular duties of clerks and officers and to attend to the day-to-day work on nominal wages, in contravention of the subsisting settlements binding on the bank, in relation to wages, allowances, leave privileges, provident fund etc., and that the manner of recruitment and the determination of the amount payable to the apprentices lacked *bona-fides*. They also pointed out that the apprentices-clerks now recruited were almost equal to the existing permanent staff and that in many banks there were no permanent clerks and they were manned only by apprentice clerks. On the other hand, the petitioner Bank in their letter dated 11th July, 1972, denied that the recruitment of apprentice clerks in any way contravened the settlement entered into between the petitioner and the Union. They also contended that there was no provision against their recruiting persons at the first instance as apprentices for a stipulated period on a monthly stipend and absorbing them on regular basis thereafter. They specifically denied that there was any substance in the criticism that in the guise of appointing apprentices, the Bank was extracting regular work from them. On the conciliation failure report submitted by the Labour Commissioner and at the request of the Union, the Government of India, in their reference aforementioned, referred the following question for adjudication:

"Whether the Management of the Bank of Madura was justified in appointing about 400 apprentice clerks during the year 1972 on a scale other than the awarded scale of pay and whether such apprentice-clerks were engaged for doing the normal clerical duties in the Bank? If they were

engaged for the said duties, to what relief, if any, are the said workmen entitled ?"

2. Before the Tribunal, the Union filed a claim statement, in which they contended that the deposits of the Bank rose from Rs. 9.73 crores to Rs. 20.73 crores during the period from August, 1971 to December, 1972, indicating a growth of 113 per cent and that in view of the increase in the volume of business, the Bank required the services of clerks on a permanent basis. But, with a view to avoid the obligation imposed and the monetary commitments under the bipartite settlement, the petitioner herein resorted to the device of recruiting apprentice clerks on nominal meagre pay. Even though the nomenclature assigned to the newly recruited staff was 'apprentice clerks', in effect they have been called upon to shoulder and discharge the routine normal duties and responsibilities of permanent clerks. Thus, in the guise of recruiting apprentices, the Management of the Bank was recruiting persons to discharge the day-to-day functions and duties of clerks on nominal pay in contravention of the Awards and Agreements. In another part of the statement, it was claimed that the increase in the volume of business necessitated the recruitment of clerks on permanent basis, but the Management resorted to unfair labour practice by employing persons as apprentices on nominal meagre pay. Another allegation in this petition was that 75 persons who were employed in the subordinate services, would have been entitled to be promoted as clerks but for the appointment of these apprentice clerks, thereby denying them the right for promotion by the device adopted by the Management of recruiting apprentices. This was also characterised as an unfair labour practice adopted by the Bank to flout the obligations under the settlement in regard to the terms.

3. The Bank of Madura Staff Union, which is another union, also filed a claim statement, in which they contended that the period of twelve months provided in the orders was too long a period, considering the actual clerical work to be learnt by them.

4. The petitioner bank filed a counter statement denying the allegation of unfair labour practice and contending that their action in appointing apprentice clerks did not in any way violate any of the agreements or awards.

5. On behalf of the Union, three witnesses were examined, who spoke to the fact that these persons recruited as apprentice clerks were performing exactly the same duties as any other permanent clerk and that only in order to deprive the employees of the dearness allowance, house rent allowance, city compensatory allowance and other allowances payable to them under the Bank Award and other agreements, the petitioner had adopted this method of recruiting apprentice-clerks. They also further stated that the training period was too long and that it was enough if training was given for 21 days. One witness, of course, said that a period of one month would be enough and the third witness said, fifteen days. The Union also filed a number of documents which are marked as Exhibits W-1 to W-31. On behalf of the Management, the Agent of the Bank of Madura at the Royapettah Branch was examined and he spoke to the factum of holding written and oral examinations for selection of apprentice-clerks and their payment as per their orders of appointment. The Management also filed certain documents. On a consideration of the oral and documentary evidence, the Industrial Tribunal, in its award dated 26th April, 1974, held that the Bank recruited these apprentices Clerks with a view to get cheap labour, amounting to unfair labour practice, that the apprentice-clerks were doing normal clerical duties, that a period of 21 days would be enough for training and that these apprentice clerks, who were confirmed, would be entitled to the pay of permanent clerks for the period beyond 21 working days from commencement of their service in the Bank. It is to quash this award, the present writ petition has been filed by the Management.

6. It was contended by the learned counsel for the petitioner that both the Sastry's Award and the Desai's

Award contemplated and considered it as legal to appoint apprentice-clerks on such terms and conditions as the Bank may choose and that the petitioner in no way had contravened any of the terms of the *bi-partite* settlement or the Bank Awards. According to the learned counsel, the petitioner had an extensive expansion programme of opening numerous branches and extending its activities and in order to meet the future demands, they selected candidates with a view to train them and absorb them at the proper time and in such circumstances it could not be characterised as any unfair labour practice. He also charged that the dispute referred to the Tribunal was vague and did not call for a finding on the question as to whether there was any unfair labour practice in this case.

7. Before I go into the question of unfair labour practice, it is necessary to understand what exactly was the question that was referred to the Tribunal. The question that was referred has already been set out in the earlier part of this order and it is not necessary to repeat the same here. There can be no doubt that the question as framed is a little ambiguous, and calls for a probing into the actual dispute in order to find out what exactly was referred to the Tribunal. It is well-settled that when a dispute arises as to the exact scope of the question referred, it is open to the Tribunal as also this Court to look into the claim petitions and the statements filed before the Tribunal in order to understand what was the exact dispute that was sought to be referred. I am in entire agreement with the counsel for the respondents that the dispute between the parties was as to whether the method adopted by the Bank was an unfair labour practice in that when an increase in the volume of work demanded recruitment of persons on permanent basis, they resorted to engaging apprentices on meagre salary. Learned counsel for the respondents further submitted that their was a question of subordinate officers losing their chance of promotion. That was also raised by the Union in their claim statements. But, I am unable to agree that this later dispute could have formed the reference to the Tribunal as there was no evidence or claim by these 75 persons, who are supposed to have lost their chances of promotion, agitating their right either by themselves or through their union. That was never in the field of disputes, so as to warrant any reference to the Tribunal. Therefore, the only dispute that could have been referred was as to whether there was any unfair labour practice in the matter of appointment of these apprentices, on the facts and circumstances of this case, on wages other than those fixed or awarded under the various Bank Awards. The Tribunal understood the reference only as meaning: "whether it amounted to unfair labour practice in employing apprentice-clerks on a scale other than those awarded under the various Bank Awards". In my opinion, the Tribunal was right in its view on the scope of the reference.

8. In the first Bank Award given by Sri Sri S. Panchapagesa Sastry, in dealing with the demands of workmen that apprentices should be paid at a rate not lower than the ordinary clerk, the right of the Management in regard to the appointment of apprentices was dealt with in paragraph 497, which reads as follows:

> "The workmen in their written statements want the Tribunal to direct that the apprentices should be paid at the rate not lower than the ordinary clerk. However, our attention has been drawn to the fact that some of these apprentices work in banks so as to qualify themselves to appear for the examinations of the Institute of Bankers. On behalf of the banks it was urged that the banks should be allowed free scope to engage apprentices as part-time or full time, and to pay them either nothing or less than what an ordinary clerk should get, and that the apprenticeship period may go up to two years. According to them the apprentices come to learn and not to do work in the full sense, and unlike the firms of accountants, banks do not charge any premium for training them. We do not feel justified in compelling the banks to pay emoulments to such apprentices

> The matter must be left to their discretion. Only there should be no discrimination. But we direct that the period of apprenticeship except in the case of those who work in banks so as to qualify themselves for the examination of the Institutes of Bankers should not exceed twelve months."

Before the second Tribunal of Sri Justice Kantilal T. Desai also, it was contended on behalf of the workmen that the discretion left to the Bank under paragraph 497 of the Sastry Award was grossly abused by the bank, that the banks appoint unpaid apprentices against permanent vacancies and further that from paid apprentices banks take normal work and utilise their services indefinitely against permanent vacancies, without paying the wages of full-fledged clerks, and that too for an indefinite period and therefore the banking industry should not be allowed to appoint apprentices and that the employees with similar qualifications without any previous experience or training are to be taken directly as probationers. This claim was dealt with in the Award in Chapter XXIII, paragraphs 22 and 23, which read as follows:

Paras. 22 *and* 23:

> "Serious allegations have been made against banks in connection with the engagement of apprentices which have been denied. There is not much evidence in support of these allegations. The Sastry Tribunal in paragraph 497 of its award has directed that 'the period of apprenticeship, except in the case of those who work in banks so as to qualify themselves for the examinations of the Insitute of Bankers, should not exceed twelve months'. This direction is a salutary one. I give a direction similar to the one given by the Sastry Tribunal".

Paras. 22-23:

> "The demand that an apprentice who has already been in the service of a bank for a total period of six months should be deemed to be a permanent employee of the bank appears to me to be unreasonable, so also the demand that apprentices who have already been in the service of a bank for a total period of two months should be deemed as probationers and confirmed accordingly. I have carefully considered all the demands made in connection with apprentices. Save as otherwise expressly provided in this award, I do not give any further or other directions in connection with apprentices."

It is not in dispute that as per the settlement arrived at between the petitioner Bank and its employees, except in regard to matters that are specifically dealt with therein, the other terms and conditions of the Award were binding on the parties. Learned Counsel for the petitioner, therefore, contended, relying on the paragraphs in the two bank awards extracted above, that the management was entitled to appoint apprentices on such terms as they choose provided the period of apprenticeship does not exceed twelve months. On the other hand, learned counsel for the respondents contended that though the management has a right to appoint apprentices in a given case, in the instant case the recruitment was necessitated by the increase in the volume of work of the petitioner bank and that the appointments were made only with reference to permanent vacancies and there can be no appointment of persons as apprentices. He also contended that the necessary and reasonable inference from the fact that a large number of persons were appointed as apprentices almost equalling to the number of permanent staff in the employ and also the fact that the period of training required for clerks should be as long as one year, is only that in the case of appointing apprentices they were getting the services of permanent clerks on payment of meagre wages, amounting to unfair labour practice. It is seen from the records, Exhibits W-9 and W-10, that the bank deposit, which was about a little over Rs.9.8 crores, increased to a little over Rs.13.75 crores at the end of the year 1971 and to Rs.20.78 crores and above by the end of the year 1972. Similarly advances also increased from Rs.6.86 crores to Rs.8.97 crores in 1971 and Rs.12.15 crores in 1972. The increase in number of branches was 28 in the year 1971 and 11 in the year 1972. In Exhibit W-10, which is a press advertisement given by the

petitioner bank, it is clearly stated that in order to meet the increased volume of work, the bank recruited as a temporary measure about 225 persons as casual employees from time to time. This situation was felt unhappy and in order to rationalise the system of recruitment resulting in better conditions of service, the bank recruited about 375 persons after conducting written tests and interviews. These facts clearly show that far from being a recruitment to meet a future expansion programme, it was with the object of meeting the present increased volume of work that these apprentices were recruited. The question then arises as to whether in such circumstances the petitioner is entitled to appoint apprentices. I am of the view that when a need arises for appointment of more number of staff in order to meet the increased volume of work, that could be only treated as permanent vacancies. It is true that the increase in the volume of work should not be temporary, and if in such cases of temporary situations, additional staff are employed, they may be treated as temporary staff. But, if the increase of work is fairly permanent, in that it is expected to continue for quite a long time, the need for appointment could be considered only on a permanent basis and no apprentices could be appointed for such vacancies. In fact, in the first Sastry's Award, a probationer was defined as an employee who is provisionally employed to fill a permanent vacancy of post and has not been made permanent or confirmed in service. Thus, if a person is appointed provisionally to fill a permanent vacancy, he could be only termed as a probationer and not as an apprentice. If he is to be termed as a probationer under the various Awards which are binding on the parties, he would be entitled to be paid equally as a permanent clerk and not anything less. Thus, in this case, though the situations warranted the appointment of permanent clerks, the management chose to appoint them as apprentiecs. This was characterised by the Union as with a view to avoid payment of wages as required by the wage awards. It may be seen from the evidence as also the findings, which could not be disputed in this writ petition, that these apprentices were performing the duties of regular clerks and their duties were in no way different from the permanent staff. The irresistible conclusion, therefore, is that the bank resorted to this method of appointing apprentices with a view to get cheap labour, amounting to unfair labour practice. There can be no doubt that if an employer, with the object of depriving an employee of his legitimate dues, appoints a person in a permanent post as an apprentice and pays him less, it would amount to unfair labour practice. A similar view wase xpressed by the Allahabad High Court in *Everready Flash Company* v. *Labour Court, Bariley and others*[1], with which I respectfully agree.

9. As already stated, the reference did not include the question as to whether the promotion prospects of the Subordinate category were affected by the appointment of these apprentice clerks. The finding on this question is therefore to be set aside. Equally, the finding of the Tribunal that the recruitment itself was not fair and was made at the sweet will and pleasure of management cannot be accepted. These two findings do not arise from the reference and therefore have to be and are set aside.

10. For the foregoing reason, I agree with the Tribunal that the recruitment of the apprentice-clerks was with a view to get cheap labour amounting to unfair labour practice and that these apprentice clerks were doing the normal work of clerks, thereby entitling them to be paid as per the variousa bnk awards.

11. The petition accordingly fails and is dismissed. The rule *nisi* is discharged. There will be no order as to costs.

S.J. *Petition dismissed*

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1. (1961) 2 L.L.J. 204.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

Ramaswamy Gounder .. *Appellant**

v.

K. M. Venkatachalam and others .. *Respondents.*

(A) *Civil Procedure Code* (*V of* 1908), *Order* 41, *rule2*—*First Appeal*—*Ground not raised in memorandum of appeal but argued*—*Question not involving investigation of new facts*—*Sufficient opportunity given to respondent*—*Appellate Court can allow question to be raised.*

At the hearing of a first appeal a question was raised by the appellant which was not mentioned in the memorandum of grounds of appeal but was based on the available facts. On the point whether such a question can be allowed to be raised by the Appellate Court,

Held, since the question raised did not involve any consideration of new facts, but merely involved the application of settled principles of law to the facts already on record, the failure of the appellant to raise this point in the grounds of appeal will not debar him from raising the plea in the course of the hearing of the appeal, particularly when the Court had given sufficient opportunity to the respondent to meet the point. [*Para.* 14.]

(B) *Specific Relief Act* (*XLVII of* 1963), *section* 22—*Suit for specific performance*—*False allegations in the plaint*—*Relief discretionary and to be granted on judicial principles*—*Falsity of case disentitles plaintiff.*

The plaintiff had filed the suit for specific performance of an agreement making false allegations. The falsity of the case directly impinged on the essential ingredients and elements necessary for claiming the relief. On the question whether the plaintiff would be entitled to the relief, *Held,* the falsity of the case put forward by the plaintiff disentitled him from obtaining the discretionary relief of specific performance of agreement. [*Para.* 16.]

Case referred to :—

Sririgneedi Subbarayadu v. *Kopanathi Tatayya and others,* (1937) M.W.N. 1158.

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*Appeal No. 11 of 1972. *8th August,* 1975.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Salem in Original Suit No. 93 of 1968.

T.R. Ramachandran, K. Chandramouli, T.R. Rajagopalan and *K.V. Rajan,* for Appellant.

V. Krishnan, for Respondents.

The Court delivered the following

JUDGMENT.—The tenth defendant in O.S. No. 93 of 1968 on the file of the Court of the Subordinate Judge of Salem is the appellant herein. Admittedly respondents two to ten herein entered into an agreement for the sale of certain immovable property for Rs. 15,500 under Exhibit A-1 dated 14th October, 1967 in favour of two individuals. The first respondent herein obtained an assignment of that agreement from those two individuals under Exhibit A-2 dated 25th October, 1967. It is on the strength of this assignment that the first respondent instituted the present suit for specific performance of the agreement under Exhibit A-1. The appellant herein, who was the tenth defendant in the suit, was the purchaser of 2/3 of the suit property under Exhibit B-9 dated 27th February, 1968 from defendants 1 and 3. According to the first respondent, the appellant herein was a subsequent transferee with knowledge of the existence of the agreement, Exhibit A-1, and therefore the sale in his favour would not be binding on him (first respondent). The first respondent stated in his plaint that an advance of Rs. 1,500 was paid on the date of Exhibit A-1, that the balance of consideration to be paid was Rs. 14,000 and that under Exhibit A-1 five months' time was available for executing and registering the sale deed. According to the first respondent, after the assignment dated 25th October, 1967 he had been pressing defendants 1 to 9 at various times to receive the balance of sale price of Rs. 14,000 and to execute the sale deed at his cost, tendered the balance of the sale price of Rs. 14,000 to defendants 1 to 9 on 14th February, 1968 and requested them to execute the sale deed in his name at his cost in respect of the suit properties after receiving the balance of the sale price, but they evaded to execute the sale deed and delayed the matter. His further case was that even prior to 14th

February, 1968 he tendered the balance of the sale price to them on many occasions and requested them to execute the sale deed after receiving the balance of the sale price and that they delayed and evaded to execute the sale deed. His further case in the plaint was that on 16th February, 1968 he and his assignors had issued a notice to defendants 1, 2, 3, 5 and 6 calling upon them to come to Pethanaickanpalayam Sub Registrar's office on 24th February, 1968 with defendants 4 and 7 to 9 and then to execute and register a proper sale deed in favour of the first respondent, after receiving the balance of the sale price of Rs. 14,000 at his cost; defendants 1 to 3, 5 and 6 had received the said notice; the first respondent went to Pethanaickenpalayam Sub-Registrar's Office on 24th February, 1968 within whose jurisdiction the suit properties were situate for the purpose of registration with necessary stamp papers and with the balance of the purchase money of Rs. 14,000 for payment to defendants 4 to 9; the first respondent had gone to the Sub-Registrar's office on 24th February, 1968 with one Rama Gounder, his son Perianna Gounder and one Annaswami and Chinna Pillai, defendants 1, 3 and 6 came to the Sub-Registrar's office on the said date and they evaded to execute the sale deed in favour of the first respondent; on 25th February, 1968 the first respondent met the first and third defendants in the house of the third defendant and requested them to execute the sale deed along with the other defendants in his favour after receiving the balance of the sale price, but they evaded and postponed the execution and registration of the sale deed; again on 26th February, 1968 the first respondent met the first defendant with the balance of the purchase money and requested her to execute the sale deed along with the other defendants after receiving the balance of the sale price, but she evaded the execution and postponed it to 29th February, 1968, and further demanded an extra amount of Rs.500. To the notice issued by the first respondent defendants 1 to 3, 5 and 6 issued a reply notice dated 22nd Februay, 1968 through their counsel with false allegations and fixing the very date of 24th February, 1968 fixed by the first respondent at an unreasonable place for the execution of the sale deed with a view to cover up their default and to evade the execution of the sale deed in favour of the first respondent; the sixth defendant had again sent another reply notice dated 22nd February, 1968 through another counsel saying that he would be present on 24th February, 1968 at the Sub-Registrar's Office for executing the sale deed, and demanding one-third portion of the sale consideration for himself. The plaint then refers to the sale of the suit property in favour of the appellant herein and states that the sale was not valid and binding on the first respondent. Under these circumstances, the first respondent prayed for a decree for specific performance of the agreement under Exhibit A-1.

2. There were three written statements, one filed by the first defendant adopted by the third defendant, another by the sixth defendant and the third by the appellant herein. One of the pleas put forward by the defendants in their written statements was that the agreement, Exhibit A-1, was to sell 1.81 acres of punja land and only 0.30 cents of nanja land in survey No. 113/4 alone and that they did not agree to sell 1.44 acres of nanja land in four survey numbers, *viz*., 113/4 113/6, 113/9 and 113/2. The appellant herein contended that he was a *bona fide* purchaser for value without notice of Exhibit A-1.

On these pleadings, the following issues were framed for trial:

1. Whether the defendants 1 to 9 agreed to sell R.S. Nos. 113/6, 113/9 and 113/2 to Rajamanickam and Periathayammal?

2. Whether Rajamanickam and Periathayammal have assigned any right in respect of R.S. No. 113/6, 112/9 and 113/2 in favour of the plaintiff under the document dated 25th October, 1967?

3. Whether the plaintiff is entitled to any relief in respect of R.S. Nos. 113/6, 113/9 and 113/2?

4. Whether the 10th defendant is not a *bona fide* transferee for value of the share of defendants 1 and 3 without notice of the alleged contract for sale?

5. Whether the plaintiff is entitled to the relief of specific performance in respect of

all or any of the items of the suit properties ?

6. Whether the plaintiff is entitled to any mesne profits ?

7. To what relief is the plaintiff entitled? The following issue was framed as an additional issue on 15th June, 1970 :

1. Whether the plaintiff will be entitled to any relief regarding S. Nos. 113/2 and the well in 113/10 ?

3. The learned Principal Subordinate Judge of Salem, by his judgment and decree dated 30th August, 1971, held that the agreement was in respect of 1.44 acres of nanja land comprised in four survey numbers and 1.81 acres of punja land and that the first respondent as an assignee of the agreement Exhibit A-1 was entitled to have that agreement enforced against the entire extent. He also held that the appellant herein had notice of the agreement Exhibit A-1, before he purchased the property under Exhibit B-9. With the result, the suit instituted by the first respondent was decreed by the learned Subordinate Judge. It is against this judgment and decree the present appeal has been filed.

4. The learned counsel for the appellant put forward three contentions before me: (1) The extent agreed to be conveyed with regard to the nanja land was only 30 cents in survey No. 113/4 and not 1.44 acres comprised in four survey numbers ; (ii) The appellant was a *bona fide* purchaser for value without notice of the agreement Exhibit A-1; (iii) In any event a decree for specific performance being a discretionary relief, the first respondent herein was not entitled to the exercise of that discretion in his favour, having regard to the several false statements made by him and false case put forward by him. I shall consider these points in that order.

5. As far as the first point is concerned, it is clear that the parties had agreed to sell only 1.44 acres of nanja land and 1.81 acres of punja land. The agreement Exhibit A-1 dated 14th October, 1967 in the portion relating to the description of property, refers to 1.81 acres of punja land, about which there is no dispute but while referring to 1.44 acres of nanja land gives the survey number only as 113/4. It is the admitted case that survey No 113/4 comprises only 30 cents. Equally it is the admitted case that defendants 1 to 9 owned 1.44 acres of nanja land in four survey numbers, the other three survey numbers being 113/2, 113/6 and 113/9. Consequently the question for consideration is whether, even though Exhibit A-1 refers to 1.44 acres of nanja land, the agreement was only in respect of 30 cents of nanja land, because it refers only to survey No. 113/4. I am of the opinion that the appellant has no case on this point. The total extent of land agreed to be conveyed under Exhibit A-1 was 1.81 acres of punja land and 1.44 acres of nanja land, totalling 3 acres and 25 cents. Admittedly the family of defendants 1 to 9 owned these 3 acres 25 cents of land and the agreement, Exhibit A-1, was entered into in respect of the entire land owned by the family. Therefore simply because only one survey number was mentioned in Exhibit A-1 and the other survey numbers were not mentioned, it could not be contended that the first respondent was entitled to have only 30 cents in survey No. 113/4 conveyed to him and not the balance of 1.44 acres of nanja land. This conclusion of mine derives support from two other circumstances also. Exhibit A-6 dated 16th February, 1968 is a notice issued by the first respondent herein and his assignors to defendants 1 to 3, 5 and 6 calling upon them to go to the Sub-Registrar's office on 24th February, 1968, to execute a proper sale deed in respect of the property agreed to be conveyed under Exhibit A-1. This notice also gives the extent of the nanja land as 1.44 acres. Though a reply was sent to this notice by the sixth defendant as well as the other defendants separately no objection whatever was taken to this extent and no case was put forward that what was agreed to be sold was only 30 cents. The second circumstance is that under Exhibit B-9 the appellant himself purchased only 2/3 of the suit property for a consideration of Rs. 10,000. The first defendant, as D.W. 1, stated in her evidence that the price for which the 2/3 was sold to the appellant under Exhibit B-9 was the proper price. I have already referred to the fact that the total consideration mentioned in Exhibit A-1 was

Rs. 15,500. Therefore, the price of 2/3 of the property roughly works out to Rs. 10,000 for which alone the appellant purchased 2/3 of the property under Exhibit B-9. This further confirms the conclusion that what was agreed to be sold under Exhibit A-1 was 1. 44 acres of nanja land and 1.81 acres of punja land, for a consideration of Rs. 15,500 and not 30 cents of nanja land and 1. 81 acres of punja land. Hence my conclusion on the first point is that the agreement was for the sale of 1.44 acres of nanja land and 1.81 acres of punja land.

6. As far as the second point is concerned there is the evidence of P.W. 4 who was admittedly a tenant of the lands, who had stated that two days after Exhibit A-8, *i.e.* after 24th February, 1968, D.W 2 (father of the appellant), who alone negotiated the sale under Exhibit B-9, came to the land and asked him not to plant sugarcane, as he was going to purchase the land, and that P.W. 4 told him that there was an agreement to sell the property to the first respondent and that therefore he was not going to stop the cultivation. There is absolutely no justification whatever for rejecting this evidence of P.W. 4. Admittedly D.W.2 was the owner of the land, just a plot removed from the suit land, and,even according to the evidence of D.W. 2, the father of the appellant, he himself knew two or three years even prior to 26th February, 1963 that the suit land would be coming up for sale and he was prepared to purchase the land. Though he denied that he ever approached P.W. 4, as stated by P.W. 4, it is clear that, as the owner of the land in the area and as a person who was going to purchase the suit land, he should have met P.W. 4. Other circumstances also confirm this view, I have already referred to the fact that the first respondent and his assignors sent a notice to the defendants asking them to go to the Sub-Registrar's office on 24th February, 1968. According to D.W. 2, on 26th February, 1968. D.W. 1 met him and offered to sell the land to him and the terms were settled and Exhibit B-9 was executed on 27th February, 1968. It is clear that there had been a tremendous hurry in executing the sale deed. Though the lands were situated within the jurisdiction of the Sub-Registrar of Pethanaickenpalayam, the sale deed was executed and registered in the office of the District Registrar at Salem. Secondly, the sale deed was executed only by defendants 1 and 3 in respect of their 2/3 share in the property and the property that was soldby them was their 2/3 share according to the final decree for partition passed between them. Notwithstanding this fact and the fact that Exhibit B-9 refers to a final decree, no description of the shares allotted to defendants 1 and 3 is given in Exhibit B-9. As a matter of fact, Exhibit B-9 asked the appellant to obtain a copy of the final decree from the advocate. Even D.W. 2 admits that he met the advocate and got the particulars. The very fact that Exhibit B-9 is bereft of particulars with regard to the description of the property sold clearly shows that the whole thing was done in a hurry and that it was done in such a great hurry only with the knowledge of the existence of Exhibit A-1 and for the purpose of preventing the first respondent herein from taking steps to have the agreement enforced. As a matter of fact, D.W. 2 admitted that he did not verify the particulars of the property though he stated that he satisfied himself with regard to the absence of any encumbrance over the property from enquiries made by him at the office. On the face of it, such an explanation on the part of D.W. 2 is unacceptable, particularly in view of the fact that D.W. 2 was himself a village munsif. Under these circumstances, I agree with the conclusion of the learned Subordinate Judge that the appellant was not a *bona fide* purchaser for value without notice of the agreement, Exhibit A-1 and this is my finding on point No. 2.

7. Then there remains the third point with regard to the discretionary nature of the relief and whether the first respondent is entitled to the exercise of that discretion in his favour. It may be mentioned that the trial Court has not considered this aspect of the matter at all. It is, however, clear that the first respondent has set up false pleas in the plaint and has uttered falsehood in his evidence on very important and vital features with reference to his right to obtain specific performance of the agreement, Exhibit A-1. I have already referred to the fact that

on 16th February, 1968 a notice under the original of Exhibit A-6 was sent by the first respondent herein and his assignors to defendants 1 to 3 and 5 and 6 calling upon them to be present at the Sub-Registrar's office at Pethanaickenpalayam on 24th February, 1968 for the purpose of executing a sale deed. In this notice it was asserted that the first respondent was ready and willing to perform his part of the contract, that he tendered the sale price on 14th February, 1968 and that even prior to that he tendered the balance of the sale price several times and called upon the defendants to execute the sale deed, but they went on evading the same. This fact is referred to in the plaint wherein it is further stated that on 24th February, 1968 defendants 1,3 and 6 had come to the Sub-Registrar's office, but evaded to execute the sale deed in favour of the first respondent. As against this case of the first respondent, the case of the defendant was that after the receipt of the notice under Exhibit A-6, they sent a reply under Exhibit A-9 dated 22nd February, 1968 through counsel stating that it would be proper to have a draft settled before executing the sale deed, that therefore the first respondent should go to the office of the counsel who sent the notice on behalf of the defendants, on 24th February 1968, where the defendants would be waiting from 9 A.M. till 12 noon and that, if the first respondent wanted, they were prepared to go over to the office of his counsel. According to them, having waited in the office of their counsel and the first respondent not having turned up, they went to the Sub-Registrar's office at Pethanaickenpalayam and waited there till 5 P.M. but the first respondent did not turn up at the Sub-Registrar's office. Evidence has been produced by both the parties to show that they were present at the Sub-Registrar's office. Exhibit A-8 is a registration copy of a mortgage deed for Rs. 7,000 executed by the first respondent in favour of one Perianna Gounder on 24th February, 1969 and registered on that day, showing that the first respondent went to the Sub-Registrar's office at Pethanaickenpalayam, on 24th February, 1968. On the other hand, Exhibit B-6 dated 24th February, 1968 is the registration copy of a mortgage deed for Rs. 300 executed by one Periasami Naicker in favour of Ramaswami, showing that D.W. 1 was an attesting witness in that case before the Sub Registrar. Therefore the evidence clearly establishes that both the parties weie present at the Sub-Registrar's office, though in the pleadings the first respondent stated that the other defendant evaded executing the sale deed. However, in the course of his evidence as P.W. 3 the first respondent completely went back on his pleadings in the plaint. He categorically stated in his evidence that defendants 1, 3 and 6 did not come to the Sub-Registrar's office, but evaded executing the sale deed, he went to the extent of stating that he did not make any such statement in the plaint and thereafter he went back on this statement and stated that he did not read the plaint. Consequently the first respondent stands condemned by his own evidence, as a liar, as far as this part of the case is concerned.

8. There is yet another aspect to be mentioned in this behalf. I have already referred to the fact that in reply to Exhibit A-6, a notice was sent under Exhibit A-9 on 22nd February, 1968 by the defendants stating that they would be waiting at the office of their counsel on 24th February, 1968 and asking the first respondent also to come there. In the plaint the first respondent stated that such a notice had been receieved. In his evidence he stated that by 24th February, 1968 such a notice was not received and that he did not verify from his counsel whether such a reply had been received or not. This is, yet another falsehood as far as the first respondent is concerned.

9. Thirdly, with regard to another vital matter, there is a complete falsehood uttered by the first respondent. I have already referred to Exhibit A-6 as well as the averments contained in the plaint, wherein the first respondent stated that on 14th February, 1969 and even prior to it he had tendered the entire balance of Rs. 14,000 to the defendants and called upon them to execute the sale deed, but they were evading to execute the sale deed. On the other hand it is clear from his own evidence that Exhibit A-8 was a mortgage executed by him on 24th February, 1968

for Rs. 7,000 for the purpose of getting that amount for paying to the defendants for obtaining the sale deed. In one portion of his evidence in chief-examination he stated that he executed the mortgage, Exhibit A-8 for getting money for the purchase of the suit property. In his subsequent evidence, however, he went back on this statement and stated that he had borrowed a sum of Rs. 7,000 from Rama Gounder, that for the balance he had his own money, that he had thus the sum of Rs.14,000 ready with him and that the mortgage under Exhibit A-8 was for the purpose of repaying the handloan obtained from Rama Gounder. Apart from there being no evidence to support this case of borrowing Rs. 7,000 from Rama Goundar as handloan, the mortgage Exhibit A-8 itself recites that the amount borrowed under that mortgage was only for the purpose of purchasing the land and therefore the same is consistent with his evidence, in chief examination, but not consistent with this evidence in cross-examination. Consequently it will be clear that he obtained the sum of Rs. 7,000 only on 24th February, 1968 for the purpose of making up the amount for the purchase of the suit poperty and therefore his claim in the plaint as well as in Exhibit A-6 that he had tendered the entire balance of Rs. 14,000 on 14th February, 1968 or prior to that was a false case.

10. Fourthly, in his evidence he stated that on 16th February, 1968 he had purchased the stamp papers for the sale deed in question and that those stamp papers were purchased in his own name, in the name of his mother Muthammal, in the name of his brother Subramaniam, and in the name of his wife, Venkatammal. A perusal of Exhibit A-7 stamp papers again falsifies this case of the first respondent. Exhibit A-7 consists of eleven stamp papers, out of which eight were purchased on 17th February, 1968 and three were purchased on 16th February, 1968. The stamp papers purchased on 17th February, 1968 had been purchased from some vendor at Madurai, and the stamp papers purchased on 16thFebruary, 1968 had been purchased from some vendor at Salem. Of the three papers purchased at Salem, two are in the name of Venkatammal, and one is in the name of Subramaniam. Out of the other stamp papers purchased in Madurai, three are in the name of Muthammal, two are in the name of the first respondent and three are in the name of Subramaniam. Therefore the case of the first respondent that he purchased the stamp papers on 16th February, 1968 is again false. Apart from this, it is doubtful whether the stamp papers could have been purchased on those dates for the purpose of the sale deed in respect of the suit property. If by 14th February, 1968 the first respondent had the entire sum of Rs. 14,000 with him and tendered the same to the defendants for the purchase of the suit property and in that connection he had purchased the stamp papers on 16th February, 1968, it passes one's comprehension as to why the stamp papers should be purchased in several names, such as Muthammal, Venkatammal and Subramaniam, instead of the stamp paper being purchased in the name of the first respondent himself, because, it was he who was going to purchase the property.

11. Thus, with regard to very vital matters, such as his having tendered the amount, his having been present at the Sub Registrar's office and met the defendants, they having refused to execute the sale deed, and his having purchased the stamp papers for the purpose of completing the sale transaction, the first respondent has proved himself to be an absolute liar and has gone to the extent of even denying his own averments made in the plaint.

12. The question for consideration is whether, under such circumstances, the first respondent was entitled to the discretionary relief of a decree for specific performance. In *Sririgineedi Subbarayadu v Kopanathi Tatayya and others*[1], a Bench of this Court had observed:

> "The relief sought lies in the discretion of the Court. The discretion of the Court is not arbitrary, but sound and reasonable and must be guided by judicial principles. This is so declared by section 22 of the Specific Relief Act. Now, in this case, the

1. (1937) M.W.N. 1158.

appellant alleged that he tendered the full amount of the purchase consideration Rs. 6,000 within two months of the agreement having been entered into and he supported this allegation on oath in the witness box. The learned trial Judge refused to believe him and we consider that he was fully justified in so doing. A plaintiff who is capable of setting up a false case cannot expect a Court of equity to grant him relief".

13. No decision of this Court or of the Supreme Court was brought to my notice dissenting from the principle laid down by the decision referred to above. As a matter of fact, as far as this Court is concerned, the above decision was referred to by two Benches, one in *Easwari Amma and another* v. *M.K. Korah and others*[1], and the other in an unreported judgment of this Court in *Kuppuswami Naidu* v. *Mannarswami Naidu*[2]. Consequently, it will follow that the first respondent herein would not be entitled to the grant of the discretionary relief of specific performance in view of his conduct referred to above.

14. Mr. V. Krishnan, the learned counsel for the first respondent, did not dispute the above position in law, but he put forward two submissions to negative the claim of the appellant in this behalf. The first contention was that the trial Court had not dealt with this question and had exercised its discretion in favour of the first respondent and that even in the memorandum of grounds of appeal before this Court such an exercise of the discretion was not questioned. The second was that it was not every falsity that would disentitle or disable a plaintiff from obtaining the relief of specific performance and that everything depended upon the degree of the falsity. As far as the first point is concerned, on a perusal of the judgment of the trial Court it would appear that the trial Court has not applied its mind to the question of the exercise of the discretion at all; it has straightaway proceeded to consider the first two questions, namely, whether under Exhibit A-1 an extent of 1.44 acres of nanja land situated in all the four survey numbers was agreed to be conveyed, and whether the appellant herein was a *bona fide* purchaser for value without notice of Exhibit A-1. It did not consider the question of the grant of a decree for specific performance being in the discretion of the Court. It is true that the point was not raised even in the grounds of appeal before this Court. However, that point was raised during the hearing of the appeal yesterday and I gave an opportunity to both parties to deal with this point, with reference to any decided case, if necessary, and gave time till today. Since the question raised did not involve any consideration or investigation of new facts, but merely involved the application of settled principles of law to the facts already on record, I do not think that the failure on the part of the appellant to raise this point in the grounds of appeal will debar him from raising this pleain the course of the hearing of the appeal, particularly when I had given sufficient opportunity to the first respondent to meet the point.

15. As far as the second point is concerned, I am clearly of the opinion that the falsity of the case of the first respondent in the present case directly impinges on the essential ingredients and elements necessary for claiming the relief of specific performance. I have already referred to the fact that the first respondent had stated in the plaint and in his evidence that he had tendered the entire balance amount of Rs. 14,000 on 14th February, 1968 and earlier and that it was the defendants who evaded to execute the sale deed, and this case of his has been found to be false. Equally, the first respondent under Exhibit A-6 had called upon the other defendants to be present at the Sub-Registrar's Office on 24th February, 1968 for the purpose of executing the sale deed, and with regard to this matter also the first respondent's evidence is directly opposed to his own case in the plaint. Thirdly, as part of his claim to have been ready and willing to perform his part of the contract, he spoke to the fact that he had purchased the stamp papers on 16th February, 1968, and that too has been found to be false. Therefore, the falsity of the case put forward by the first respondent did not relate to incidental or ancillary matters, but was directly concerned with his allegations on the basis of which alone he

1. A.I.R. 1972 Mad. 339.
2. A.S. Nos. 367 and 696 of 1970, dated 11th April, 1975.

claimed the relief of specific performance of the agreement.

16. Under these circumstances, I am definitely of the opinion that the falsity of the case put forward by the first respondent herein clearly disentitles him from obtaining the discretionary relief of specific performance of the agreement, Exhibit A-1. Hence the appeal is allowed, the judgment and decree of the trial Court are set aside, and the suit instituted by the first respondent for specific performance of the agreement, Exhibit A-1, will stand dismissed. In view of the fact that the point on which the appeal succeeds has not been taken even in the grounds of appeal, I do not consider that this is a proper case in which I should award costs in favour of the appellant. For the same reason, the parties shall bear their respective costs in the trial Court also.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ., and S. Natarajan, J.*

J. Harigopal Agarwal and another .. *Appellants**

v.

The State Bank of India, Ambattur Industrial Estate, Madras-58 and others .. *Respondents*

and

State Bank of India, Ambattur Industrial Estate, Madras-58 .. *Plaintiff*

v.

M/s. Madras Bolts and Nuts (Private) Limited, Madras and others .. *Respondents.*

Indian Contract Act (1 of 1872), sections 140 and 141—Scope and application.

Sections 140 and 141 of the Indian Contract Act deal with different situations. Section 140 applies where a guarantor has paid the whole or part of the liability which is guaranteed, and in that case, the guarantor *pro tanto* will be subrogated to the position of the creditor and as subrogee he will be entitled to all the rights which the creditor had against the principal debtor. In other words, this section, by reason of payment by the guarantor, entitles him to enforce the securities in his own right, which were originally available to the creditor. Section 141, however applies to a different situation. It is designed to protect the guarantor, against the acts of the creditor losing or without the consent of the surety or guarantor parting with the security. Where payment has been made by the guarantor, there is no need to resort to section 141. While section 140 relates to enforcement of liability under the security available to a creditor, section 141 deals with the protection of a guarantor and reduction of his liability in proportion to the security lost or parted with by the creditor without the guarantor's consent.

[*Para.* 5.]

Having regard to the peculiar nature of the security in the instant case, namely, the goods, which according to the agreement between the creditor and the guarantors should be sold from time to time and the proceeds should be brought to the credit of the borrower, a company, for adjustment, the account being a continuous one as also the transactions of sale of goods brought in from time to time, the value of goods available as security at the time the guarantors resigned as directors of the company should be taken into account for the purposes of adjusting the guarantors' liability.

[*Para.* 6.]

Appeal under clause 15 of the Letters Patent against the decree and judgments of N.S. Ramaswami, J., dated 5th January, 1973 and made in exercise of the ordinary Original Civil Jurisdiction of this Court in C. S. No. 111 of 1968 and Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to amend the written statement by introducing the following paragraph (Para-

* O.S.A. No. 94 of 1973 and
C.M.P. No. 9777 of 1974.

26*th November*, 1974.

graph No. 18-A) in between paragraphs 18 and 19 in O.S.A. No. 94 of 1973.

"The Defendants 3 and 4 submit that they are entitled under section 141 of the Indian Contract Act to get credit for the value of the assets raw materials and furnished goods etc., given as security and available as on 12th August, 1966 but disposed of thereafter. The defendants 3 and 4 therefore, if at all, will be liable only in respect of the amount that may be found due after giving credit to the value of the securities in shape of machineries, raw materials and finished goods as on 12th August, 1966. In any event all the amounts realised by sale of assets, raw materials or finished goods as were available on 12th August, 1966 should go to discharge the liabilities of the defendants 3 and 4 and the defendants 3 and 4 can be held liable only for any balance that may remain. In other words it is not open to the plaintiff to adjust the realisation of the securities as on 12th August, 1966 towards any liabilities incurred by the company (1st defendant) subsequent to 12th August, 1966."

K. Venkataswamy, for Appellant.

Devadasan, Sagar and *S. Narayana Ayyangar*, for Respondent.

The Judgment of the Court was delivered by.

Veeraswami, CJ.—This appeal against a decree of N.S. Ramaswami, J., is brought by defendants 3 and 4. The first respondent-plaintiff, the State Bank of India, allowed the first defendant, a private limited company, to draw from it on three accounts at its Pondicherry Branch, Lock and Key Credit account, Cash Credit Factory account and Overdraft against bills account. As on 15th September, 1964, the debts on these accounts respectively were Rs. 26,992-94, Rs. 30,160.00 and Rs. 61,707.89. On that date, the appellants became Directors of the Company and executed fresh documents to continue the accounts. On 9th December, 1964 the three accounts were transferred to Madras as No. 1 account, as the Company's headquarters had been shifted to Ambattur by then. It appears that, on 18th August, 1965 there was due a sum of Rs. 2,36,762.89. On that date a new agreement was executed for Mandy type of account and defendants 2 to 4 executed a guarantee for two lakhs of rupees. On 12th August, 1966 the appellants resigned their directorship. The transactions of deposits and withdrawals by the company continued even thereafter until a suit was instituted. *Pendente lite* goods worth about Rs. 95,000 were sold with the permission of Court. The trial Judge granted a decree for the entire balance due against the first defendant company, as also the second defendant. So far as the appellants-defendants 3 and 4 were concerned, the decree stated that, since after the filing of the suit a sum of Rs. 95,000 was said to have been realised by the plaintiff-Bank by selling the securities, whatever amount had been realised should go in partial satisfaction of the decree. On 18th August, 1965 the appellants executed a surety agreement securing overdraft account with the State Bank of India to an extent of two lakhs of rupees. It started by saying that, in consideration of the State Bank of India having agreed at their request to grant to the first defendant-company accommodation by way of cash credit to the extent of two lakhs of rupees, the account to be operated upon either at the Madras Branch of the Bank or any other Branch of the Bank, the guarantors agreed to guarantee repayment of whatever might be due on the overdraft account. They also agreed that the cash credit account was to be secured by the hypothecation and pledge of goods and documents of title to goods under separate agreements to be taken from time to time. They further agreed that no failure in requiring or obtaining the security or in the observance or performance of any of the stipulations or terms of the said agreement and no default of the plaintiff-Bank in requiring or enforcing the observance or performance of any of the stipulations or terms should have the effect of releasing the guarantors from their liability or of prejudicing the Bank's rights or remedies against them under the promissory note which they had as primary security for re-payment of whatever was outstanding on the overdraft account. The document went on to say that the guarantors agreed that they should have no right to the benefit of any other security that might be held by the Bank until

the claim of the Bank against the borrower in respect of the cash credit and of all other claims of the Bank against the borrower or any other account whatsoever had been fully satisfied.

2. N.S. Ramaswami, J., on a construction of the agreement of guarantee and after considering sections 140 and 141 of the Indian Contract Act, held that each of the defendants was liable to pay the Bank the amount outstanding by way of the first defendant's borrowings upto the date of filing of the suit, with the reservation that the liability of the appellants would be with reference to the outstandings as on the date when they resigned as Directors of the Bank. There was also a further reservation, as we have already noted, that any realisation by way of sale of goods *pendente lite* should also go in reduction of the decree liability of the appellants.

3. On the view we take, it seems to us to be unnecessary to cover the entire area of the issue as settled at the trial. There is no dispute that the liability of the appellants should be confined to that upto the date of their resignation as Directors. The controversy between the appellants and the Bank is whether the appellants as guarantors would not be entitled to a reduction proportionate to the value of the goods available with the Bank as on the date of their resignation as Directors of the Company. The other question is whether the guarantors' liability was also covered by the borrowings of the first defendant prior to the appellants becoming Directors of the Company.

4. So far as the second question is concerned, we have no doubt that the liability of the appellants as guarantors would arise only with reference to the borrowings or outstandings arising subsequent to the date of their becoming Directors and entering into a guarantee agreement and not anterior to that date. The learned Judge who tried the suit, construed the guarantee agreement as covering the liability for the borrowings earlier to the date of the guarantee agreement. We are unable to agree with the construction which he has placed upon the document. Exhibit P-10 is specific in its recitals, and there is nothing in it to indicate that the guarantor's liability would also cover the liability of the Company by way of borrowing on the overdraft account anterior to the date of the guarantee agreement.

5. On the first question, first we shall dispose of the arguments addressed to us with reference to the scope of sections 139, 140 and 141 of the Indian Contract Act. The first of these sections relates to the discharge of surety by creditor's act or omission impairing surety's eventual remedy. This section has no application to the facts of the present case. Section 140 provides for subrogation where the guarantor clears his liability by payment. He is invested with all the rights which the creditor had with the principal debtor. Section 141 reads :

> " A surety is entitled to the benefit of every security which the creditor has against the principal-debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. "

While the appellants rely on section 141 for their contention that their liability as guarantors would be confined only to the extent to which the securities were not realised, the learned Advocate-General for the first respondent-Bank contends that the appellants could place no reliance upon section 141 unless they had made payment towards the guaranteed liability. For the rival contentions, our attention has been invited to a few decided cases and also to Pollock and Mulla Indian Contract Act, 9th Edition. We have given our careful attention to the citations, but feel that, where interpretation of the scope of a particular section is involved, we have first to apply our minds to the language used in the section and the context in which the section occurs. It seems to us that sections 140 and 141 deal with different situations. Section 140 applies where a guarantor has paid the whole or part of the liability which is guaranteed and, in that case, the guarantor *pro tanto* will be subrogated to the position of the creditor and as subrogee he will be entitled to all the rights which the creditor had against the princi-

pal-debtor. In other words, this section, by reason of payment by the guarantor, entitled him to enforce the securities in his own right, which were originally available to the creditor. Section 141, however, applies to a different situation. It is designed to protect the guarantor against the acts of the creditor losingor without the consent of the surety or guarantor parting with the security. The protection, according to the learned Advocate-General, is available only when the surety has paid. We are unable to accept this contention, for there is no such indication in the section. In fact, the first illustration to the section shows that payment is not a requisite for the benefit contemplated by the section to accrue to the surety. This is not a case of subrogation but a case where the surety is entitled to a discharge of his liability *pro tanto* the value of the security discharged in proportion to the extent of the value, of security which the creditor has lost or which without the consent of the guarantor he has parted with. This is what is brought out by the first illustration. Where payment has been made by the guarantor, there is no need to resort to section 141. While section 140 relates to the enforcement of liability under the security available to a creditor, section 141 deals with the protection of a guarantor and reduction of his liability in proportion to the security lost or parted with by the creditor without the guarantor's consent.

6. In the light of this construction which we are inclined to place on those two sections, argument had been addressed to us for the appellants that, as on the date of the appellants resigning as Directors of the Company, goods worth more than two lakhs of rupees were available with the creditor as security for the outstandings, and that these should go in reduction of the guarantor's liability. But this approach had not been made at the trial in that form. A petition, C M.P.No. 9777 of 1974, has been filed to amend the written statement to take the plea. We have allowed that petition. In the light of this plea, the question arises what was the security available with the Bank at the time the contract of suretyship was entered into. That expression in section 141, namely, "when the contract of suretyship is entered into", only means that the surety cannot claim any benefit to any security available before that date. Having regard to the peculiar nature of the security, namely, the goods which according to the agreement between the Bank and the appellants should be sold from time to time and the proceeds should be brought to the credit of the borrower for adjustment, we are inclined to think that, the account being a continuous one and so too the transactions of sale of goods brought in from time to time, the value of the goods available as security at the time the appellants resigned as Directors of the Company should be taken into account, for purposes of adjusting the guarantor's liability.

7. Since we have only the figures furnished by the Bank as to the various transactions relating to the sale of the goods available as on the date of the appellant's resignation as Directors of the Company and prior to the institution of the suit, it is necessary that further evidence will have to be taken. The learned Advocate-General represents to us that such evidence is necessary to explain the entries. We accept his contention.

8. On that view, we allow the appeal, set aside the decree of the learned trial Judge in so far as it related to the appellants and direct that the suit be disposed of afresh in respect of them after taking further evidence, oral and documentary. Since we remit the matter to the trial Court, the Court fee paid by the appellants will be refunded to them. The costs of the appeal will abide the result of the suit as regards the appellants.

R.S. ——— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*M.M. Ismail, J.*

B. Narasimhalu Chettiar and others .. *Petitioners**

v.

The Central Government represented by Secretary, Ministry of Finance (Department of Revenue and Insurance), New Delhi and others .. *Respondents.*

(A) *Gold Control Act* (*XLV of* 1968), *sections* 27 *and* 114—*Gold Control* (*Licensing of Dealers*) *Rules*, 1969, *rules* 3 (ee) *and* 2 (f) —*Rule* 3 (ee) *whether* "ultra vires"—*Scope of rule* 2 (f).

(B) *Constitution of India* (1950), *Articles* 14 *and* 19 (1) (g).

Rule 3 (*a*) of the Gold Control (Licensing of Dealers) Rules, 1969, requires that an application for the renewal of a licence held by a dealer should be made in the prescribed form at least one month before the expiry of the period of validity thereof. Under clause (*ee*) of the Rule, introduced by an amendment of the Rule on 27th December, 1972, if the turnover of the applicant for renewal in the 12 months immediately preceding the date of application for renewal of the license was "too low", the application shall be rejected. The Explanation attached to the clause recited that for the purposes of the clause "low turnover" means a turnover which is on the average not more than 50 grammes per month except where the applicant satisfies the Administrator that there are sufficient reasons for an avarage monthly turnover lower than 50 grammes. Certain persons licensed as dealers under section 27 of the Gold Control Act, 1968, for the year 1972, whose applications for renewal of license for 1973 had been rejected by the licensing authority, challenged in writ petitions the validity of rule 3 (*ee*) as unconstitutional, violative of their fundamental rights under Article 19 (1) (*g*) of the Constitution, and conferring an unguided power on the licensing authorities and therefore offending Article 14 of the Constitution and as being outside the rule-making power of the Central Government itself.

Held : In regard to applying rule 3 (*ee*) in the first place, there is absolutely no guideline to the licensing authorities to decide when a turnover can be said to be too low. Secondly, the turnover which is said to be too low falls to be calculated not with reference to a standard or fixed or uniform period, but with reference to variable periods. There is no provision whatever in the rules prescribing the earliest point of time at which an application for renewal can be made. Therefore depending upon the particular point of time at which an application is made, the rule will have to be applied differently to different individuals because the twelve months period under rule 3 (*ee*) has to be calculated backwards from the date of the application for renewal. If the rule is in force certainly it will be open to an applicant to choose the best of twelve months period and file his application for renewal with reference to such a turnover. Certainly that could not have been a satisfactory and fair method of dealing with the right of an individual to carry on his business, which is his fundamental right under Article 19 (1) (*g*) of the Constitution.

[*Para.* 4.]

There is absolutely no guideline whatever for the licensing authorities to determine what is said to be "too low a turnover". This is yet another factor which will make the rule work differently to different individuals depending upon the particular officer who deals with the application for the renewal of the licence. The Explanation does not throw any light on what can be said to be "too low a turnover". All that the Explanation says is that a turnover which is on the average not more than 50 grammes per month will be considered to be "a low turnover". On the face of it, "too low a turnover" must be lower than the 'low-turnover', that is, 50 grammes on an average per month. The result is, there is no indication whatever in the rules as to what turnover below 50 grammes average per month can be considered to be "too low a turnover". Apart from

* W.Ps. Nos. 6144 to 6163 of 1973 etc.

16*th August*, 1974.

this, the Explanation itself confers an absolutely arbitrary power on the licensing authorities to treat "a low turnover" as not "a low turnover" if the applicant satisfies the licensing authority that there are sufficient reasons for an average monthly turnover of less than 50 grammes. Here again, there is absolutely no guidance whatever in the rules.

[*Para.* 5.]

Actually looked at from the point of view of there being no guidance whatever to determine what exactly is too low a turnover or looked at from the point of view of the licensing authorities exercising their discretion in favour of the applications for renewal holding that their turnover were not low, the rule is capable of arbitrary application and abuse, and therefore, it offends Article 14 of the Constitution and that too with reference to the exercise of the fundamental right of the citizens under Article 19 (1) (*g*).

Rule 2 (*f*) of the Rules dealing with matters to which regard shall be had before issuing a license and stating that the licensing authority shall have regard to the need to increase the number of licensed dealers in a city or town etc., is applicable only to the grant of license and not to the renewal of a licence.

[*Paras.* 11 *and* 12]

Rule 2 (*f*) shows that the increase in the number of licensed dealers will have to be with reference to a particular city, town or district and it cannot be with reference to any *ad hoc* or arbitrary turnover, which has no reference whatever to the city, town or district. It may be in one place the demand for gold is much having regard to the status, affluence and the custom of the people living in that area. But in another place, the demand may not be so much. To treat both of them alike, without reference to the peculiar situations prevailing in each locality, will to be deny equality of opportunity provided for in Article 14 of the Constitution of India. That is the reason why rule 2 (*f*) expressly refers to the city, town or district being taken as a unit and the number of licences being determined with reference thereto. In these particular cases the imposition of rule 3 (*ee*) is a general one and not with reference to the peculiar or particular, situation prevailing in a particular city, town or district, and therefore rule 3 (*ee*) as introduced, by the amendment, cannot be justified with reference to rule 2 (*f*) of the Rules. Section 27 (6-A) of the Gold Control Act expressly contemplates the Central Government making special Rules with reference to this statutory provision, if it is of opinion that it is necessary or expedient in the interests of the general public, to restrict or reduce the number of licensed dealers, having regard to the quantity of gold produced in India and the supply therein of gold through lawful channels. Here also, the proviso makes it absolutely clear that the rules which are special in character and which have to be made pursuant to section 27 (6-A) are not on a par with those made under section 114, in view of different provisions having been made as to the time when they will come into force. Section 114 (3) of the Act imposes an obligation on the Central Government to place the rules framed by it under section 114 on the table of both the Houses of Parliament, even though the Rules themselves come into force immediately or on the date notified by the Central Government.

[*Para.* 13.]

Rule 2 (*f*) concentrates its attention to the situation prevailing in a particular city, town or district and is not general. Simply because there is a provision in rule 2 (*f*) for increasing the number of licences over and above the existing licences, having regard to the particulars mentioned therein, it cannot be contended that in order to enable other persons to apply for licences, the Government wanted to eliminate from the field those persons who had transactions of too low a turnover. Even assuming that such a statement can be valid, it passes one's comprehension as to how it advances the interests of the general public. On the other hand, if there are genuine dealers as well as persons having nominal transactions side by side, the sheer spirit of business competition will drive one out of the field and enable the other to continue the business. Therefore to allow the normal spirit of business competition to play its role among the licencees will be a factor in favour of the general public who will be enabled to choose their dealer and not the other way

about. Therefore, this limitation, with reference to turnover cannot be said to be a reasonable restriction in the interests of the general public. Rule 3 (*ee*) constitutes an unreasonable restriction on the fundamental rights of the petitioners to carry on their business and hence it cannot be given effect to or enforced against them. [*Para.* 14.]

Rule 3 (*ee*) introduced by the Central Government does not fall within the scope of any of the enumerated matters in section 114 (2) of the Gold Control Act. If at all, it can fall only within section 114 (1) of the Act. If so, it must be with the object of carrying out the purpose of the Act. The rule in question does not carry out the purposes of the Act. From this point of view also, the rule in question can be said to be *ultra vires*. [*Para.* 16.]

Cases referred to:—

Horakchand Ratanchand Banthi and others v. *Union of India and others*, (1970) 1 S.C.R. 479: A.I.R. 1970 S.C. 1453; *Badri Prasad* v. *Collector of Central Excise, Sarvodayanagar, Kanpur and others*, (1972) 1 S.C.J. 224: A.I.R. 1971 S.C. 1170; *State of Madras* v. *V. G. Raw*, 1952 S.C.J. 253: (1952) 2 M.L.J. 135 : 65 L.W. 420: 1952 S.C.R. 597: A.I.R. 1952 S.C. 196.

Petitions under Artilce 226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* (A) calling for all the connected and relevant records relating to the order Nos.

(1.) C.No. XVII/7/73/73, T.S. dated 25-9-73 in W.P.No. 6144/73; (2) XVII/7/51/73-T8 dated 25-9-73 in W.P. No. 6145/73; (3) XVII/7/52/73—T8 dated 25-9-73 in W.P.No. 6146/73; (4) XVII/7/58/73/T8 dated 25-9-73 in W.P.No. 6147/73; (5) C. No. XVII/7/92/73/ T8 dated 25-9-73 in W.P.No: 6148/73; (6) XVII/7/76/73/T8 dated 25-9-73 in W.P. No. 6149/73 ; (7) XVII/7/41/73/T8 dated 25-9-73 in W.P.No. 6150/73; (8) XVII/7/48/73 T8 dated 25-9-73 in W.P. No. 6150/73 ; (9) C.No. XVII/7/62/73-T8 dated 25-9-73 in W.P.No. 6152/73; (10) C.No. XVII/7/29/73-T8 dated 25-9-73 in W.P.No. 6153/73; (11) XVII/7/47/73-T8 dated 25-9-73 in W.P.No. 6154/73; (12) C.No. XVII/7/31/73-T8 dated 25-9-73 in W.P.No. 6155/73; (13) XVII/7/49/73-T8 dated 25-9-73 in W.P.No.6156/73; (14) C.No. XVII/7/95/73-T8 dated 25-9-73 in W.P.No. 6157/73; (15) C.No. XVII/7/72/73-T8 dated 25-9-73 in W.P. No. 6158/73; (16) C.No. XVII/7/75/73-T8 dated 25-9-73 in W.P.No. 6159/73; (17) C.No. XVII/7/35/73-T8 dated 25-9-73 in W.P.No. 6160/73; (18) C.No. XVII/7/90/73-T8 dated 25-9-73 in W.P.No. 6161/73; (19) XVII/7/79/73/T8 dated 25-9-73 in W.P.No. 6162/73; (20) C.No. XVII/7/104/73/T8 dated 25-9-73 in W.P. No. 6163/73. (21) C.No. XVII/7/24/73-T8 dated 25-9-73 in W.P.No. 6171/73; (22) C.No. XVII/7/33/73-T8 dated 25-9-73 in W.P. No. 6172/73; (23) C.No. XVII/7/61/73-T8 dated 25-9-73 in W.P.No. 6173/73; (24) XVII/7/57/73-T8 dated 25-9-73 in W.P.No. 6174/73; (25) C.No. XVII/7/25/73-T8 dated 25-9-73 in W.P.No. 6175/73; (26) XVII/7/54/73-T8 dated 25-9-73 in W.P.No. 6176/73; (27) C.No. XVII/7/56/73-T8 dated 25-9-73 in W.P.No. 6177/73; (28) C.No. XVII/7/16/73-T8 dated 25-9-73 in W.P. No. 6178/73.; (29) C.No. XVII/7/88/73-T8 dated 25-9-73 in W.P.No. 6179/73; (30) C.No. XVII/7-/70/73-T8 dated 25-9-73 in W.P.No. 6180/73; (31) XVII/7 21/73-T8 dated 25-9-73 in W.P.No.6180/73; (32) C.No. XVII/87/78/73-T8 dated 25-9-73 in W.P.No. 6182/73; (33) C.No. XVII/7/18/73-T8 dated 25-9-73 in W.P. No. 6183/73; (34) XVII/7/36/73-T8 dated 25-9-73 in W.P.No. 6184/73; (35) C.No. XVII/7/97/73-T8 dated 25-9-73 in W.P.No. 6184/73; (36) XVII/7/42 73-T8 dated 25-9-73 in W.P.No. 6186/73; (37) C. No. XVII/7/91/73-T8 dated 25-9-73 in W.P.No. 6187/73; (38) C.No. XVII/7/107/73-T8 dated 25-9-73 in W.P. No. 6188/73; (39) C.No. D.B. Dis. A.No. 125/73/Gc XVII/13/205/73 dated 7-11-73 in W.P.No. 6229/73; (40) C.No. D.B. Dis. A.No. 123/73-*Gc.* XVII/13/203/73 dated 15-11-73 in W.P.No. 6230/73; (41) C.No. XVII/7/131/73-Gc. dated 15-11-73 in W.P.No. 6392/73 and (42) C.No. XVII/7/34/73 dated 10-12-73 in W.P.No. 156/74 passed by the second respondent herein in each of the petitions and quash the said orders (B) Calling for the records relating to the order of the second respondent and made in (1) No. D.VII/7/8/73/Gc/ dated

4-11-73 in W.P.No. 6763/73;(2) C.No. XVII 7/105/73 GO. dated 4-10-73 in W.P.No 103/74 ; (3) C.No. XVII/7/9/73 Go. dated 9-11-73 in W.P.No. 106/74 and (4) C.No. XVII/7/6/73 dated 16-2-74 in W.P.No. 673/74 and quash the said orders and (C) Calling for the records in (1) C.No. XVII/7/70/73 GO dated 4-10-73 (in W.P. No.194/74) and (2) C. No. XVII/7/69/73 GO dated 4-10-73 in W.P. No. 195/74 (1) of the second respondent and quash the same.

S.Chellaswamy, K A. Panchapagesan, S.Selvaratinam, V. Radhakrishnan, for Petitioners.

K. Parasaran, Central Government Senior Standing Counsel, for Respondents.

The Court made the following

ORDER.—All these writ petitions raise a common question regarding the validity of rule 3 (*ee*) of the Gold Control (Licensing of Dealers) Rules, 1969, hereinafter referred to as the Rules, as amended by the Government of India Notification dated 27th December, 1972 published in the Gazette of India, Extraordinary on 27th December, 1972. The validity of this Rule is challenged from different angles as being unconstitutional violating the fundamental rights of the petitioners under Article 19 (1) (*g*) of the Constitution of India, and as conferring an unguided power on the licensing authorities and therefore offending Article 14 of the Constitution of India, and as being outside the rule-making power of the Central Government itself. It was also challenged on yet another ground which has relevancy to the year 1973 only. I shall refer to that also in the course of this judgment.

2. All these petitioners have been licensed as dealers under section 27 of the Gold Control Act (XLV of 1968) (hereinafter referred to as the Act), for the year 1972. Most of them claim to be dealers in gold even before the Act came into force. Rule 3 (*a*) of the Rules requires that an application for renewal of a licence should be made in the prescribed form at least one month before the expiry of the period of validity thereof. In the present cases, the licences which the petitioners were holding for the year 1972 were to expire on 31st December, 1972 and therefore they should have made their applications for renewal on or before 30th November, 1972. Admittedly the petitioners had made their applications before that date. It is unnecessary for me to refer to the provisions of the Act and the rules as well as the objects sought to be achieved by the Act for the simple reason that they have been elaborately set out in the two judgments of the Supreme Court, namely, *Harakchand Ratanchand Banthi's and, others etc.* v. *Union of India and others*[1], and *Badri Prasad* v. *Collector of Central Excise, Sarvodayanagar, Kanpur and others*[2]. All that is necessary for the purpose of understanding the point raised in these writ petitions is to refer to Chapter VII of the Act, which deals with dealers and the provisions contained in section 27 which occurs in that chapter and deals with licensing of dealers. Sub-section (1) of that section states that save as otherwise provided in that Act, no person shall commence, or carry on, business as a dealer unless he holds a valid licence issued in that behalf by the Administrator. Sub-section (2) states that a licence issued under that section shall be in such form as may be prescribed, shall be valid for such period as may be specified therein, may be renewed from time to time, and shall be subject to such conditions and restrictions as may be prescribed, the last of the requirements having been introduced by the Central Act XXVI of 1969 after the judgment of the Supreme Court in the former decision referred to above. Sub-section (3) states that every licence issued before the coming into force of the Act under Part XII-A of the Defence of India Rules, 1962, or under the Gold (Control) Ordinance, 1968, would continue to be valid until the cancellation thereof under the Act. Sub-section (4) enables a person holding a licence at the commencement of the Act to continue to carry on the business and obtain a renewal of the licence. Sub-section (5) enables a person who intends to commence business after the commencement of the Act as a dealer to apply for a licence and obtain one. It is sub-section (6) of section 27 which is important. Even at this stage, it is necessary to point out that sub-section (6) of section 27 as

1. (1970) 1 S.C.R. 479 : A.I.R. 1970 S.C. 1453.
2. (1972) 1 S.C.J. 224 : A.I.R. 1971 S.C. 1170.

it stood originally was struck down as unconstitutional by the Supreme Court in the former decision referred to already on the ground that it constituted an imposition of unreasonable restriction on the fundamental right of a citizen to carry on business. Having struck down section 27 (6), the Supreme Court also pointed out that the licensing scheme contemplated by the rest of section 27 of the Act itself could not be worked in practice and therefore observed :

"It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose in exercise of its rule-making power under section 114 of the Act."

It is thereafter the Central Government promulgated the Gold (Control) Amendment Ordinance, 1969, (VI of 1969) which came into force on 3rd July, 1969. Section 27 (6) of the Act was replaced by a new provision with retrospective effect, from the date of the original Act itself. At the same time, on the very same date, the Gold Control (Licensing of Dealers) Rules, 1969, also were promulgated. Section 27 (6) (*b*) as amended which alone is relevant in connection with the renewal of licences provides as follows :

"No application for the renewal of a licence to carry on business as a dealer shall be rejected unless the holder of such licence has been given a reasonable opportunity of presenting his case and unless the Administrator is satsified that —

(*i*) the application for such renewal has been made after the expiry of the period specified therefor, or

(*ii*) any statement made by the applicant at the time of the issue or renewal of the licence was incorrect or false in material particulars, or

(*iii*) the applicant has contravened any term or condition of the licence or any provision of this Act or any rule or order made thereunder or of any other law for the time being in force in so far as such law prohibits or restricts the bringing into or taking out of India of any goods (including coins, currency, whether Indian or foreign, and foreign exchange) or the dealing in such goods by way of acquisition or otherwise, or

(*iv*) the applicant does not fulfil the prescribed conditions.

As far as the rules are concerned, Rule 2 of the rules dealt with matters to which regard shall be had before issuing a licence. Rule 3 dealt with matters to be considered for the renewal of a licence and the same is as follows :

"3. A dealer shall be qualified for the renewal of the licence held by him if he fulfils the following conditions, namely :—

(*a*) that the application has been made in the prescribed form at least one month before the expiry of the period of validity thereof ;

(*b*) that the prescribed fees for the renewal of the licence have been duly deposited ;

(*c*) that the premises where the applicant is carrying on business as a licensed dealer continues to be suitable and secure for the carrying on therein of such business ;

(*d*) that no statement made by the applicant at the time of the issue of renewal of the licence was incorrect or false in material particulars ;

(*e*) that no condition of the licence has been contravened by the applicant ;

(*f*) that the applicant has not contravened any provision of the Gold (Control) Act, 1968 or any rule or order made thereunder or of Part XVII-A of the Defence of India Rules, 1962, or of any other law for the time being in force in so far as such law prohibits, restricts or regulates the bringing into or taking out of India of any goods (including coins, currency, whether Indian or foreign and foreign exchange) or the dealing in such goods by way of acquisition or otherwise."

After clause (*e*) of the above rule, a new clause (*ee*) was introduced by way of amendment on 27th December, 1972 as

referred to already and that clause is as follows :

> "3 (*ee*) that the turnover of the applicant in the twelve months immediately preceding the date of application for renewal of the licence was too low.
>
> *Explanation.*—For the purposes of this clause, low turnover means a turnover which is on the average, not more than fifty grammes per month except where the applicant satisfies the Administrator that there are sufficient reasons for an average monthly turnover of lower than fifty grammes."

It is the validity of the above rule that is challenged in these writ petitions.

3. As I have pointed out already, the petitioners contend that this amended rule cannot apply to an application for renewal for the year 1973, because the amendment came into force only on 27th December, 1972, while all the applications for renewal should have been made and were actually made on or before 30th November, 1972 and to such applications this amendment ought not to have been given effect to. From one point of view, it is unnecessary to decide this question in the present writ petitions for the simple reason that the year 1973 is past, and during that period by virtue of interim orders passed by this Court the petitioners had been granted renewal of licences and they had been functioning as dealers and therefore it may not be really necessary to consider this question now, though I am inclined to agree with the contention of the petitioners. I may also indicate one other reason why this amended rule could not be given effect to in respect of licences for the year 1973. As I have pointed out already, all the applications for renewal should have been made and were actually made by the petitioners on or before 30th November, 1972 and several other applications by other persons also had been made on or before that date. In between 30th November, 1972 and 27th December, 1972 several applications for renewal had been ordered actually without reference, to this amended rule and only because of the fortuitous circumstance or accident of the applications not having been disposed of before 27th December, 1972, this amended rule came to be applied to those applications for renewal which remained undisposed of on 27th December, 1972. This will be a practical ground for holding that the amended rule 3 (*ee*) should not have been given effect to to the applications for renewal for the year 1973. As I have pointed out already, in view of the peculiar facts of these cases, namely, that the year 1973 is past and for that year the petitioners by virtue of interim orders passed by this Court had been granted renewal of licences and they had been carrying on business, it may not be necessary to decide that question finally for the purpose of these writ petitions.

4. The real question is whether the rule introduced by the amendment is really *ultra vires* and unconstitutional as offending Articles 14 and 19 (1) (*g*) of the Constitution of India. I may immediately refer to the highly defective language in which the rule itself has been couched. I have extracted the rule in full. The rule itself states that if the turnover of an applicant for renewal in the twelve months immediately preceding the date of application for renewal of the licence was too low, the application for renewal shall be rejected. In the first place, there is absolutely no guide-line to the licencing authorities to decide when a turnover can be said to be too low. Secondly, the turnover which is said to be too low is not to be calculated with reference to a standard or fixed or uniform period, but with reference to variable periods. I have already drawn attention to rule 3 (*a*) of the rules which provides that an application for renewal should be made at least one month before the expiry of the period of validity thereof. There is absolutely no provision whatever in the rules prescribing the earliest point of time at which the application for renewal can be made. Theoretically speaking, there is nothing to prevent a person applying for renewal of his licence for the year 1973 even in January, 1972, since the rule only requires the minimum period that should elapse between the application for renewal and the expiry of the validity of the current licence. Therefore, depending upon the particular point of time at which an application is made, the rule will have to be applied differently to different individuals, because the twelve months period has to be

calculated backwards from the date of the application for renewal. If the rule is in force, certainly it will be open to an applicant to choose the best of twelve months period and file his application for renewal with reference to such a turnover. Certainly that could not have been a satisfactory and fair method of dealing with the right of an individual to carry on his business, which is his fundamental right under Article 19 (1) (*g*) of the Constitution of India.

5. There is absolutely no guide-line whatever for the licensing authorities to determine what is said to be " too low a turnover ". This is yet another factor which will make the rule work differently to different individuals depending upon the particular officer who deals with the application for the renewal of the licence. The Explanation does not throw any light on what can be said to be "too low a turnover". On the other hand, all that the Explanation says is that a turnover which is on the average not more than 50 grammes per month will be considered to be "a low turnover". On the face of it, ' too low a turnover' must be lower than the 'low turnover', that is, 50 grammes on an average per month. The result is, there is no indication whatever in the rules as to what turnover below 50 grammes average per month can be considered to be ' too low a turnover '. Apart from this, the Explanation itself confers an absolutely arbitrary power on the licensing authorities to treat 'a low turnover' as not ' a low turnover ' if the applicant satisfies the licensing authority that there are sufficient reasons for an average monthly turnover of lower than 50 grammes. Here again, there is absolutely no guidance whatever in the rules. It may be pointed out in this context that the power to grant a licence and renewal thereof under section 27 of the Act has been conferred on Assistant Collectors of Central Excise. The Assistant Collectors of Central Excise functioning in different regions deal with different applications for renewal and they may give effect to this Explanation in different ways. As a matter of fact, the facts of the present cases themselves very strongly illustrate the possibility of caprice and vagary of individual Assistant Collectors of Central Excise playing a vital part in dealing with the applications for renewal filed by different persons. In the affidavits filed in support of many of the writ petitions, the petitioners have given the names of five individuals in whose cases, according to the petitioners, the turnover was nil, and the applications for renewal were granted. Though the counter-affidavit filed on behalf of the respondents had not dealt with the cases of these persons, the files relating to these five individuals have been produced before me by the learned counsel appearing for the respondents. One of the names actually mentioned by the petitioners in the writ petitions is one K.R. Sundaram Achari of Tiruppathur. With regard to him, his turnover for 1972 was only 15.392 grammes. In his explanation he stated that he was suffering from asthma for the past four years (prior to 13-3-73, the date of his explanation), that he was taking medical treatment for the same and that hence he could not do business during 1972. He also submitted a certain doctor's prescription in support of his contention. The Assistant Collector, Vellore, accepted this explanation and granted renewal of the licence.

6. The second case referred to is one of V.S. Basheer Ahmed of Tiruppathur. His turnover for the year 1972 was nil. In his explanation, he stated that he was suffering from stomach trouble and took medical treatment at C.M.C. Hospital, Vellore and hence he could not do any business during 1972. He also stated that on the date of his explanation in March, 1973, he was all right and that he would do more business. He had further stated at the personal hearing given by the Assistant Collector at Central Excise, Vellore that he was suffering from ulcer for the past seven or eight years (prior to the personal hearing). He produced documents to prove his attendance at C.M.C. Hospital, Vellore. He assured that he would do more business in future. His application for renewal was also granted by the Assistant Collector of Central Excise, Vellore Division, Vellore.

7. The third case mentioned by the petitioners, is one relating to M.A. Abdul Malick of Tiruppathur (wrongly mentioned by the petitioners as K.A. Abdul Malick) His turnover for the year 1972 was nil. His explanation was that due to

his ill-health and attending to Court cases, he could not do any business during 1972. He also stated that his building owner had filed a case in Court to vacate the dealer's premises and the Court had ordered to vacate the premises in 1972 and that he had shifted the dealer's premises in 1972 and started business only at the end of 1972. The Assistant Collector of Central Excise, Vellore Division, Vellore, accepted this explanation and granted the application for renewal of the licence.

8. The fourth case mentioned by the petitioners is that of A. Poongavana Achari of Tiruvannamalai. He had transacted business in 1972 to the extent of 295-259 grammes. His explanation was that he had done gold dealer's business for the past 14 years (prior to his explanation), that due to ill-health and family affairs he could not attend the shop and that he would be doing more transactions for the year 1973. He had also stated that his family was depending upon the gold business and therefore he requested for renewal of the licence. His licence was also renewed by the same Assistant Collector of Central Excise, Vellore Division, Vellore.

9. The fifth case mentioned by the petitioners is that of B. Soganraj Jain of Gudiyatham. His transactions for the year 1972 amounted to 523-965 grammes. His explanation for the low turnover for the year 1972 was his ill-health. He produced a medical certificate in support of his statement. At the personnel hearing, he also stated that he had conducted upto 1200 grammes in 1970, 1000 grammes in 1971 and that only in 1972 he was unable to do business due to the fact that he was not doing well. He also was granted the renewal of the licence by the same Assistant Collector of Central Excise, Vellore Division, Vellore.

10. The cases of some of the petitioners whose applications for renewal of licences were rejected can now be contrasted with those of the five individuals mentioned above. The petitioner in W.P. No. 6392 of 1973 whose turnover was 126 grammes in 1972 had stated before the Assistant Collector of Central Excise, Pondicherry that he was suffering from diabetes and blood pressure and that he had been under treatment during the previous year, that is, 1972. He had also stated that he had to conduct his son's marriage and for that he was having negotiations for about two months and that hampered his business. He further pointed out that from October, 1972 to July, 1973 he had transacted business upto 343 grammes. Notwithstanding this, the Assistant Collector of Central Excise, Pondicherry, stated that the explanation was not convincing and refused the renewal of the licence. So also the petitioner in W.P. No. 6172 of 1973 stated before the Assistant Collector of Central Excise, Vellore, that he was suffering from sugar complaint and that was the reason for his not having sufficient turnover. The petitioners in W. P. No. 6178 of 1973 also stated before the Assistant Collector of Central Excise, Vellore, that he was in the hospital during the last year (prior to his explanation) on account of illness and hence he could not attend to the business. The petitioner in W.P. No. 156 of 1974 had stated before the Assistant Collector of Pondicherry that due to the ill-health of his wife, he could not attend to the work and that he had to be with her frequently in the Nursing Home at Pudukottai where she was under treatment. He further stated that from November, 1972 till the date of his explanation he had transacted business upto 1453·752 grammes. Notwithstanding this, the Assistant Collector of Central Excise, Pondicherry, stated that the transactions were not upto the margin in 1972 and that the explanation was not convincing. Similar cases can be multiplied.

11. It may also be noted that while the Assistant Collectors of Central Excise had renewed licences in respect of persons whose turnover was nil, they had refused to renew the licences in cases where the applicants had shown much greater turnover. In fact, the petitioner in W.P. No. 6153 of 1973 had shown a turnover of 301·635 grammes; the petitioner in W.P. No. 6157 of 1973 had shown a turnover 306.459 grammes, the petitioner in W.P. No. 6158 of 1973 had shown a turnover of 359. 416 grammes; the petitioner in W.P. No. 6159 of 1973 had shown a turnover of 495.855 grammes and the petitioner in W.P. No. 156 of 1974 had shown a turnover of 304.426 grammes for the year. In

all these cases, the applications for renewal had been rejected by the concerned Assistant Collector of Central Excise. Mr. K. Parasaran at one stage wanted to contend that in the cases in which renewal was granted, the grant of renewal might have been erroneous and those cases in which the renewal was refused, the refusal of renewal might be right. I am not concerned here as to which of the orders is right or wrong. I am merely referring to these features only for the purpose of showing the possibility of abuse and arbitrariness in the application of the amended rule in question. These facts themselves clearly and strikingly illustrate the arbitrary exercise of power with reference to the Explanation to rule 3 (*ee*) extracted already. Actually looked at from the point of view of there being no guidance whatever to determine what exactly is too low a turnover or looked at from the point of view of the licensing authorities exercising their discretion in favour of the applications for renewal holding that their turnover were not low, the rule is capable of arbitrary application and abuse and therefore it offends Article 14 of the Constitution of India and that too with reference to the exercise of fundamental right of the citizens under Article 19 (1) (*g*) of the Constitution of India.

12. As far as the second aspect of the matter is concerned, I asked the learned counsel for the respondents as to what exactly is the need for imposing a turnover criterion for the purpose of renewing a licence. The learned counsel referred to the counter-affidavit filed in these writ petitions wherein reliance has been placed on rule 2 (*f*) as well as the provisions contained in section 27 (6-A) of the Act. In my opinion, neither of these provisions supports the case of the respondents herein. Rule 2 (*f*) of the Rules, dealing with matters to which regard shall be had before issuing a licence, states that the licensing authority shall have regard to the need to increase the number of licensed dealers in the city or town in which the dealer intends to carry on business or where the applicant intends to carry on business in a village, the need to increase the number of licensed dealers in the district within which such village is situated, having regard to :—

> " (*i*) the number of licensed dealers existing in such city, town or district as the case may be ; and
>
> (*ii*) the demand for ornaments which is likely to arise in such city, town or district, such demand being estimated on the basis of the turnover of the licensed dealers, existing therein, for a period of three years, preceding the year in which such application for the issue of licence has been made and such turnover shall be determined on the basis of the accounts and returns submitted under the law, for the time being in force in relation to gold. "

In the first place, this rule will have application only to the grant of licence and will have no application to the renewal of licence. The Supreme Court itself in *Harakchand Batanchand Banthia and others etc.* v. *Union of India and others*[1], to which I have already drawn attention, had pointed out that there should be a distinction between the requirements at the stage of the grant of licence for the first time and those at the stage of renewal of a licence. In paragraph 18 of the judgment, the Supreme Court observed :

> " It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous as the conditions for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of section 26 of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be unreasonable. "

It is in view of the above observations alone, the Central Government when it subsequently framed these rules, made separate provisions for grant of licence and for renewal of licence. Having regard to the above observations of the Supreme Court as well as the deliberate conduct on the part of the Central Government in making separate provisions for

1. (1970) 1 S.C.R. 479 : A.I.R. 1970 S.C. 1453.

matters dealing with grant of licence and for those dealing with renewal of licence, it is not open to the respondents to rely upon rule 2 (*f*) in support of their present case.

13. There is yet another reason for holding that the respondents cannot rely upon this rule. The rule, as extracted, clearly shown that the increase in the number of licensed dealers will have to be with reference to a particular city, town or district and it cannot be with reference to any *ad hoc* or arbitrary turnover, which has no reference whatever to the city, town or district. It may be in one place the demand for gold is much having regard to the status, affluence and the custom of the people living in that area. But in another place, the demand may not be so much. To treat both of them alike, without reference to the peculiar situations prevailing in each locality, will to be deny equality of opportunity provided for in Article 14 of the Constitution of India. That is the reason why rule 2 (*f*) expressly refers to the city, town or district being taken as a unit and the number of licenses being determined with reference thereto. In these particular cases, the imposition of rule 3 (*ee*) is a general one and not with reference to the peculiar or particular, situation prevailing in a particular city, town or district, and therefore rule 3 (*ee*) as introduced, by the amendment, cannot be justified with reference to rule 2 (*f*) of the Rules.

So far as reliance on section 27 (6-A) of the Act is concerned, here again the respondents cannot derive any support. Section 27 (6-A) is as follows :

> " Where the Central Government, having regard to the quantity of gold produced in India and the supply therein of gold through lawful channels, is of opinion that it is necessary or expedient in the interests of the general public so to do, it may, notwithstanding anything contained in this section, direct the Administrator to restrict or reduce the number of licensed dealers to such extent and in such manner as may be specified by rules made in this behalf :
>
> Provided that no such rules shall come into force until the expiry of the period referred to in sub-section (3) of section 114 and if, before the expiry of the said period, both Houses of Parliament agree in making any modification in the rule or both Houses of Parliament agree that the rule should not be made the rule shall come into force only in such modified form or be of no effect, as the case may be. "

This provision expressly contemplates the Central Government making special rules with reference to this statutory provision, if it is of opinion that it is necessary or expedient in the interests of the general public, to restrict or reduce the number of licensed dealers, having regard to the quantity of gold produced in India and the supply therein of gold through lawful channels. Here also, the proviso makes it absolutely clear that the rules which are special in character and which have to be made pursuant to section 27 (6-A) are not on a par with those made under section 114, in view of different provisions having been made as to the time when they will come into force. Section 114 (3) imposes an obligation on the Central Government to place the rules framed by it under section 114 of the table of both the Houses of Parliament, even though the Rules themselves come into force immediately or on the date of notified by the Central Government, and the said section 114 (*c*) is as follows :

> " Every rule made by the Central Government under this section shall be laid as soon as may be after it is made, before each Houses of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immeditely following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule. "

On the other hand, the proviso to section 27 (6-A) constitutes an exception to this

provision and the rules made under section 27 (6-A) will not come into force until the expiry of the period referred to in sub-section (3) of section 114.' Admittedly no rules have been made under section 27 (6-A) of the Act. So long as no rules have been made under that provision, the respondents cannot rely upon the statutory provision contained in section 27 (6-A) itself in support of the amended rule 3 (*ee*). Therefore, I have to decide on the constitutional validity of rule 3 (*ee*) without reference either rule 2 (*f*) of the Rules or section 27 (6-A) of the Act. I am making it clear that whatever observations I am making on rule 3 (*ee*) as to its constitutional validity is without any reference whatever to the power of the Central Government to make rules under section 27 (6-A) of the Act. I am not expressing any opinion as to what will be the efficacy or vires of this rule, if the Central Government makes special rules under section 27 (6-A) of the Act. Against this background, I shall now consider the validity of Rule 3 (*ee*).

14. In my opinion, this rule 3 (*ee*) imposes an unreasonable restriction on the fundamental right of the petitioners to carry on business as gold-dealers. Various sections of the Gold (Control) Act, 1968 as originally enacted had been struck down by the Supreme Court in the former judgment referred to by me already only on the basis that they interfered with the fundamental rights of the citizens to carry on business as gold-dealers. Consequently, I have now to consider this question only on the basis of the petitioners having a fundamental right to carry on business as dealers in gold. The simple question for consideration, is what is the relevancy of a particular turnover in a particular period and how does it in any way advance the interests of the general public, with reference to which alone a reasonable restriction can be imposed on the fundamental rights of citizens under Article 19 (1) (*g*) of the Constitution of India. The respondents have not placed any materials before the Court to show that such a restriction is necessary in the interests of the general public. In paragraph 6, (Page 5) of the counter-affidavit filed before this Court, it is stated:

"The Central Government, on the basis of a survey conducted by them found that there are a substantially large number of dealers who had no transactions or who had very nominal transactions according to their accounts. These dealers continued to get their licences renewed irrespective of the quantum of transaction. The existence of these licencees who were doing nominal transactions prevented genuine traders from entering into the business, as one of the conditions to be taken into account in issuing a fresh licence is the need to increase the number of licensed dealers in the locality concerned. With a view to limiting such licensed dealers who had no transactions or who had very nominal transactions so as to afford an opening for really *bona fide* persons to apply for and obtain licences, the Central Government in exercise of the powers conferred on them by section 114 of the Gold Control Act, 1968 issued the amendment under notification F.No.131/6/72-Gc 11 dated 27th December, 1972 to the Gold Control (Licensing of Dealers) Rules, 1969 introducing a new sub-rule (*ee*) to rule 3."

I am unable to hold that this statement contained in the counter-affidavit in any way supports the validity of the rule in question. I have already referred to the fact that rule 2 (*f*) concentrates its attention to the situation prevailing in a particular city, town or district and is not general. It is not the case of the respondents that in any particular area new persons applied for licences and that their applications had to be rejected taking into account the existence of the number of licences including those held by persons like the petitioners. Simply because there is a provision in rule 2 (*f*) for increasing the number of licences over and above the existing licences, having regard to the particulars mentioned therein, it cannot be contended that in order to enable other persons to apply for licences, the Government wanted to eliminate from the field those persons who had transactions of too low a turnover. Even assuming that such a statement can be valid, it passes one's comprehension as to how it advances the interests of the general pub-

lic. On the other hand, if there are genuine dealers as well as persons having nominal transactions side by side, the sheer spirit of business competition will drive one out of the field and enable the other to continue the business. Therefore to allow the normal spirit of business competition to play its role among the licences will be a factor in favour of the general public who will be enabled to choose their dealer and not the other way about. Therefore, this limitation, with reference to turnover cannot be said to be a reasonable restriction in the interests of the general public. I repeat again that apart from the contention put forward in paragraph 6 of the counter-affidavit extracted already, the Central Government had not placed any material before the Court as to how the imposition of the new condition advances the interests of the general public or is in the interests of the general public. Therefore I am clearly of the opinion that rule 3 (*ee*) constitutes an unreasonable restriction on the fundamental rights of the petitioners to carry on their business and hence it cannot be given effect to or enforced against them.

15. In this context, it is relevant to extract the observations made by the Supreme Court in *State of Madras* v. *V. G. Row*[1], which the Supreme Court itself referred to and relied on in its judgment in *Harakchand Batanchand Banthia and others etc.* v. *Union of India and others*[2], referred to already :

> " It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. "

1. 1952 S.C.J. 253 : 1952 S.C.R. 597 : (1952) 2 M.L.J. 135 : A.I.R. 1952 S.C. 196.
2. (1970) 1 S.C.R. 479 : A.I.R. 1970 S.C. 1453.

These observations acquire significance by virtue of the fact that the Supreme Court itself applied these observations in determining the constitutional validity of certain provisions of the very same Gold Control Act in the decision referred to already. With reference to the above observations, it cannot be held that the requirement as to a particular turnover provided for in rule 3 (*ee*) of the Rules passes the test of reasonableness.

16. There is yet another aspect of this identical question. What exactly is the relevancy of the turnover to the licensing provisions themselves? The object of the Gold Control Act, as I have already pointed out had been elaborately set out in the judgment of the Supreme Court to which I have already drawn attention, namely, *Harakchand Batanchand Banthia and others etc.* v. *Union of India and others*[1]. In paragraph 14 of this judgment, the Supreme Court extracted the case of the Central Government as put forward in the counter-affidavit filed by it as follows :—

> " It is stated in the counter-affidavit that the impugned Act was passed in order to bring about reduction in the quantity of smuggled gold by rendering smuggling more dangerous and the disposal of smuggled gold in the domestic market more difficult. Even though import of gold had been banned considerable quantities of contraband gold find their way into this country through illegal channels. The Customs Department is in itself not in a position to effectively combat smuggling over the long borders and the coast lines and, therefore, the anti-smuggling measures have to be supplemented by a detailed system of control over internal transactions so as to make the circulation of smuggled gold more difficult, if not impossible. The loss of foreign exchange caused by smuggling of gold was estimated at nearly Rs. 100 crores per year in the post-devaluation period, and Government felt that it was very necessary to reduce the internal demand for gold and erect barriers to the circulation of smuggled gold within

1. (1970) 1 S.C.R. 479 : A.I.R. 1970 S.C. 1453.

the country. The submission of Mr. Setalvad, was that the reasonableness of the impugned provisions of the Act had to be judged in the light of the widespread smuggling of gold which, if not checked, was calculated to destroy the national economy and hamper the country's economic stability and progress."

The impugned rule 3 (ee) was made under section 27 (6) read with section 114 of the Act. It passes one's comprehension as to how the prescription of a particular turnover achieves the object of the Act, as set out by the Central Government itself in the counter-affidavit filed before the Supreme Court, and extracted above. From that point of view also,it can be held that the impugned rule is outside the scope of the rule-making power of the Central Government. As I have already pointed out, the rule was made only under section 27 (6) read with section 114 of the Act. Section 27 (6) (*b*) which I have already extracted as far as the present contest is concerned, merely refers to an applicant not fulfilling the prescribed conditions. Section 114 (1) of the Act states that the Central Government may, by notification, make rules for carrying out the purposes of this Act. It is admitted that rule 3 (*ee*) introduced by the Central Government does not fall within the scope of any of the enumerated matters in section 114 (2) of the Act. Therefore, if at all, it can fall only within section 114 (1) of the Act. If so, it must be with the object of carrying out the purposes of the Act. I have already referred to the purposes of the Act and the rule in question does not carry out the purposes of the Act. From this point of view also,the Rule in question can be said to be *ultra vires*. As I have already pointed out, I am deciding the validity of rule 3 (*ee*) independent of the special rules that may be made be the Central Government under section 27 (6-A) of the Act.

17. The prescription of a particular turnover in the past as a condition for eligibility for obtaining a renewal of a licence may have relevancy to and a bearing on the question if the total number of licences to be granted in a defined area or region is restricted or limited and that question may possibly arise only if and when the Government of India makes special rules in exercise of its powers under section 27 (6-A) of the Act. Since no such rules have been made now, there is no limitation on the number of licences that can be granted or renewed generally, without reference to the peculiar and particular situations of a city, town or district and that is the reason why I have observed that I am deciding this question without reference to the power of the Central Government under section 27 (6-A) of the Act.

18. Under these circumstances, I have no hesitation in holding that rule 3 (*ee*) of the Rules is *ultra vires* and unconstitutional and therefore it cannot be enforced against the petitioners. In form, the petitioners have prayed for the issue of a writ of *certiorari* quashing the orders of the Assistant Collectors of Central Excise concerned declining to grant renewal of licences for the year 1973. Since that year is past, from one point of view that relief has become really infructuous. But the substantial question which was raised in these writ petitions and which is still alive is in relation to the validity of rule 3 (*ee*) itself which can be enforced against the petitioners for succeeding years and therefore both sides argued on the validity of rule 3 (*ee*) and invited the Court to pronounce its verdict on the same. Accordingly I have discussed the matter and held that the rule in question is *ultra vires*, and unconstitutional.

19. Hence, there will be a declaration in these writ petitions that rule 3 (*ee*) of the Rules, as introduced by the notification of the Central Government dated 27th December,1972published in the Gazette of India, Extraordinary, dated 27th December, 1972 is *ultra vires* and unconstitutional and a direction will issue to the respondents herein not to enforce the said rule against the petitioners. There will be no order as to costs in any of the writ petitions.

R S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A Varadarajan, J.*.

K. Ramachandra Rao .. *Petitioner**

v.

Krishnaswami Iyengar and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 14 (1) (b) *—Landlord—Petition for eviction—Demolition and reconstruction—Building* 50 *years old—Landlord's requirement held not* bona fide.

The landlord filed a petition under section 14 (1) (*b*) of the Rent Control Act, for eviction of the tenant. Eviction was ordered by the Rent Controller, but the Appellate Authority dismissed the petition. On revision, the Revisional Authority differed from the Appellate Authority and ordered eviction. Thereafter the tenant filed a revision petition to the High Court.

Held, (on the facts), that it was not possible to hold that the requirement of a landlord, who had no doubt the means and had obtained the necessary licence from the concerned authorities, was *bona fide*, where his case in the petition for eviction was that the building was old and in a dilapidated condition and he therefore required it for purposes of immediate demolition and reconstruction and that allegation had not been substantiated but had been found to be otherwise in that the building had been found to be in a sound condition although it was about 50 years old. [*Para.* 3.]

Cases referred to :

David v. *Daniel*, (1967) 1 M.L.J 110; *Appavu Gramani and another* v. *Jayalakshmi Ammal*, (1971) 2 M.L.J. 296 : 84 L.W. 497.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Judge, West Thanjavur, dated 30th January, 1974 and passed in C.R.P.No. 2 of 1973. (C.M.A. No. 49 of 1971 on the file of the Court of the Subordinate Judge, Kumbakonam as against R.C.O.P. No. 137 of 1969 on the file of the Court of the Rent Controller (District Munsif) Kumbakonam).

U. Somasundaram and *P. Kothandaraman*, for Petitioner.

K. Ramaswami, *A. Sarojini Bai*, *V. Venkataswamy* and *M.A. Abdul Huq*, for Respondents.

The Court made the following

ORDER:—This petition is to revise the judgment of the learned District Judge, West Thanjavur (Revisional Authority) made in C.R.P.No. 2 of 1973 in which the learned Judge has ordered eviction of the petitioner on the ground that the building occupied by him for the purpose of his business is required *bona fide* by the respondent for the purpose of demolition and re-construction.

2. The respondent filed the eviction petition R.C.O.P.No. 137 of 1969 before the Rent Controller, Kumbakonam under section 14 (1) (*b*) alleging that the building is in very bad state of repairs and requires to be immediately pulled down and re-constructed and that he therefore requires the building for the purpose of demolition and re-construction. The learned Rent Controller did not give any specific finding regarding the condition of the building but allowed the petition observing that there is nothing uncommon in the petitioner before him requiring the building for demolition and reconstruction and that under these circumstances he has no reason to doubt the honesty and *bona fides* of the petitioner before him. But on appeal, the Appellate Authority (Subordinate Judge of Kumbakonam) in C.M.A.No. 49 of 1971 came to a different conclusion and allowed the appeal and dismissed the petition. He has taken note of the case of the respective parties by observing that while it is the case of the petitioner before the Rent Controller that the building was in a dilapidated condition and required immediate demolition and re-construction, the respondent before the Controller contended that the building is in a good condition and that he had

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*C.R.P. No. 1377 of 1974.

4th July, 1975.

also improved it by spending about Rs. 2,000. The witness examined on behalf of the landlord had not gone inside the building and did not know anything about its actual condition. But he has admitted that the building is fit for the tenant's furniture business and that the tenant had also put up a terrace to the building. No doubt, the tenant had admitted that originally the building was constructed about 50 years ago. However, in the opinion of the learned Appellate Authority the testimony of the tenant proved that the building is in a good condition and that he had also improved it by spending some amounts. He has drawn the inference that since the tenant is running a furniture mart in the building it can also be safely inferred that the building is in fact, in good condition and that otherwise the furniture mart cannot be run in the building. In these circumstances the learned Appellate Authority has expressed the view that the landlord has not satisfactorily proved that the building is really in need of immediate demolition and reconstruction. In that view he allowed the appeal and dismissed the petition as stated above. But the Revisional Authority appears to have not taken into consideration the evidence of R.W. 1 that he had terraced the building and has observed in his judgment that the building itself is a tiled one. He has not given any finding regarding the condition of the building but has observed that he does not see any oblique motive in the petition for eviction. In that view he held that the requirement of the landlord was *bona fide* and ordered eviction.

3. The learned District Judge has not got any satisfactory reason for differing from the learned Appellate Authority on the question that the building is not in such condition as to require immediate demolition and reconstruction and for taking a different view that the landlord requires the petition-mentioned building *bona fide* for the purpose of immediate demolition and reconstruction. It is not possible to agree with the learned counsel for the respondent that the *bona fides* should be inferred from the other circumstances proved by the landlord namely, his means and the fact that he has obtained the necessary licence from the Municipality for demolition and reconstruction. But he has not cited any authority in which it was the case of the landlord that the building was in a dilapidated condition and that it has been found by the trial Court and the Appellate Authority to be not so but to be in a good condition and still it has been held that the requirement of the landlord is *bona fide*. He however, relies on the decisions in *David* v. *Daniel*[1], and *Appavu Gramani and another* v. *Jayalakshmi Ammal*[2], but they do not help the case of the landlord. In my view, it is not possible to hold that the requirement of a landlord who has no doubt the means and has obtained the necessary licence from the concerned authorities is *bona fide* where his case in the petition for eviction is that the building is old and in a dilapidated condition and that he therefore requires it for purposes of immediate demolition and reconstruction and that allegation has not been substantiated but has been found to be otherwise in that the building has been found to be in a sound condition although it is about 50 years old. In these circumstances it is not possible to uphold the Judgment of the learned District Judge.

4. The petition is allowed with costs throughout.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

Karuppa Thevar and another .. *Appellants**

v.

Ganapathi Gounder and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—What amounts to—Good faith of purchaser—Burden wrongly placed—Appellate Court can consider evidence.

Where intention to defeat or delay creditors on the part of the transferor in conveying property is established, the burden of

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1. (1967) 1 M.L.J. 110.
2. 84 L.W. 497 : (1971) 2 M.L.J. 296.

* S.A. No. 1314 of 1972.

30*th September*, 1975.

proving that, the transferee did not share the intention of the transferor to defeat the creditors by effecting the transfer, is upon the transferee and not upon the person attacking the alienation as having been made with intent to delay and defeat the creditors Where a decision has been rendered throwing the burden wrongly on a party, merely on that basis the appellate Court, in second appeal, has jurisdiction to go into the matter and consider the evidence in the case. [*Paras.* 9, 10.]

Cases referred to :—

Naniams v. *Rangappa*, (1953) 2 M.L.J. 737: 66 L.W. 729: A.I.R. 1954 Mad. 173; *Abdul Shukoor Saheb* v. *Papa Rao*, (1964) 1 M.L.J. (S.C.) 49 (1964) 1 S.C.J. 168: (1964) 1 An.W.R. (S.C.) 49: A.I.R. 1963 S.C. 1150 ; *Jogi Reddi* v. *Chinnabbi*, (1929) I.L.R. 52 Mad. 83: (P.C.) 56 M.L.J. 165: 56 I.A. 6: 114 I.C. 5: A.I.R. 1929 P.C. 13.

Appeal against the decree of the Court of the Subordinate Judge (II Additional) Coimbatore in Appeal Suit No. 210 of 1971 preferred against the decree of the Court of the District Munsif (Additional), of Tirupur in Original Suit No. 233 of 1966.

S. Thyagaraja Iyer, for Appellants.

C. Chinnaswami, for 1st Respondent.

The Court delivered the following

JUDGMENT.—The plaintiffs, who failed in both the Courts below, are the appellants. The first appellant (first plaintiff) filed O.S. No 137 of 1952 against the deceased second defendant and his two other brothers in the District Munsif's Court, Tiruppur, for partition and separate possession of an one-fourth share in certain family properties and obtained a preliminary decree for partition and separate possession of one-fourth share and costs of Rs. 428.51 on 25th March, 1957. Exhibit A-3 is the certified copy of the preliminary decree. Subsequently, he sold some properties to the second appellant (second plaintiff) and both the appellants filed an application for passing a final decree in I.A. No. 810 of 1959 on 25th October, 1960. Both the appellants filed E.P.No. 341 of 1962 for delivery of possession of the one-fourth share allotted to the first appellant and for attachment of the one-fourth share of the second defendant in three items of properties for realisation of the costs of Rs. 428.51. The three items of properties sought to be attached are : 1.16 acres of wet lands in Survey No. 270/4, 6.09 acres of dry lands in Survey No. 265/1 and 8.56 acres of dry lands in Survey No. 268 of Karavalur village in Avanashi taluk. There was an order on 21st March, 1962 for attachment of the second defendant's share in those properties to be effected by 21st April, 1962 and the attachment appears to have been effected prior to that date. The first appellant's one-fourth share was delivered in E.P.No. 341 of 1962 on 1st April, 1962 and the attached properties were ordered to be sold on 8th January, 1963 and the execution petition was adjourned to 11th January, 1963 for further hearing. Subsequently, the second defendant executed the sale deed, Exhibit B-1 dated 14th May, 1962, in respcet of his one-fourth share in the aforesaid properties in favour of the first defendant for a consideration which is recited as Rs. 4,000. However, he filed E.A.No. 56 of 1963 in that execution petition on 8th January, 1963 for adjournment of the sale fixed on that date and paid a sum of Rs. 100 and the sale was adjourned to 22nd January, 1963 on the same proclamation, after entering part-satisfaction. Again he filed E.A. No.151 of 1963 in that execution petition on 21st January, 1963 saying that his propertiesare brought to sale on that day and he had already paid Rs. 100 and that in spite of efforts he was unable to secure anything more than Rs. 95 and that the sale may be adjourned by two months after entering part-satisfaction for that amount to enable him to pay the balance as the crops will be ripe for harvest only two months later. Exhibit A-8 is the copy of the affidavit filed by the second defendant in that application. The sale was adjourned to 5th February, 1963 and the execution petition was ordered to be posted on 8th February, 1963 for further proceedings. E.P.No. 341 of 1962 was dismissed on 8th February, 1963 keeping the attachment pending for three months, and E.P. No. 397 of 1963 was filed within that period for realising the balance of the costs by sale of the attached properties. In that execution petition the second defendant filed E.A.No.2047 of 1963 on 4th

November, 1963 for adjournment of the sale saying that the immovable properties belonging to him are brought to sale and he had been able to secure only Rs. 100 and that the sale may be adjourned by two months after entering part-satisfaction for that amount as the crops raised by him would be ripe for harvest only in two months. The sale was accordingly adjourned to 19th November, 1963 after entering part-satisfaction for Rs. 100 and the execution petition was posted to 23rd November, 1963 for further hearing. ExhibitA-9 is the copy of the affidavit filed by the second defendant in that application. The second defendant filed E.A. No. 2165 of 1963 on 18th November, 1963 for adjournment of the sale posted to 19th November, 1963 by two months saying that his properties are brought to sale on 19th November, 1963 and that the sale may be adjourned after entering part-satisfaction for a sum of Rs. 75 offered then as the crops raised on the lands will become ripe for harvest only two months later. The sale was accordingly adjourned to 3rd December, 1963 after entering part-satisfaction for Rs. 75. Exhibit A-10 is the copy of the affidavit filed by the second defendant in that application. The second defendant again filed E.A. No. 2415 of 1963 on 16th December, 1963 for adjournment of the sale by one month after tendering Rs. 50 saying that his properties are being brought to sale on 17th December, 1963 and that he may be given a month's time for payment of the balance as the crops on the lands will be ripe for harvest only in a month. The sale was accordingly adjourned to 7th January, 1964 after part-satisfaction had been entered for Rs. 50 and the execution petition was dismissed on the adjourned date *viz.*, 10th January, 1964. By that time a sum of Rs. 420 out of Rs. 428.51 for costs had been paid and mesne profits had to be ascertained under the preliminary decree. Mesne profits payable to the appellants by the second defendant were ascertained on 8th August, 1964 as Rs. 1,683.25 and the appellants filed E.P.No. 199 of 1965 for recovery of that amount and got the very same properties attached again on 6th April, 1965 and the sale was posted to 2nd November, 1965. Then the first defendant filed a claim petition in E.A. No. 1746 of 1965 on 27th October, 1965 on the basis of the sale deed, Exhibit B-1. The claim petition was allowed on 16th December, 1965. Exhibits A-1 and A-2 are the certified copies of the fair order and decretal order respectively made in that application. The appellants filed the present suit for setting aside this claim order.

2. The trial Court found that the recital in the affidavit, Exhibits A-8 to A-11, that the crops raised by the second defendant would become ripe for harvest in the future may relate to the other properties of the second defendant and dismissed the suit. This finding has been confirmed by the learned Subordinate Judge of Coimbatore. Hence the Second Appeal.

3. The learned counsel for the appellants contends that both the Courts below had overlooked the fact that the second defendant has stated in the affidavits, Exhibits A-8 and A-9 filed after the date of the alleged sale under Exhibit B-1 on 14th May, 1962 that his properties were being brought to sale for realisation of the costs due under the decree in the partition suit and that the lower appellate Court has wrongly cast the burden of proving that the first defendant intended to defeat and delay the creditors in executing Exhibit B-1 and submits that in these circumstances this Court would have jurisdiction to interfere with the judgment of the Court below in this second appeal.

4. The sale-deed Exhibit B-1, has been executed on 14th May, 1962 after the properties had been attached sometime prior to 21st April, 1962 for realisation of the costs of Rs. 428.51 payable to the first appellant from the second defendant under the decree in O.S.No. 137 of 1952 referred to above. On that day the mesn profits payable to the first appellant from the second defendant remained to be ascertained. Then it was that the second defendant had executed the sale deed, Exhibit B-1, in favour of the first defendant saying that the consideration of Rs. 4,000 had been paid to the second defendant. The evidence is that this amount was paid to the second defendant one hour prior to the time of registration of the sale deed and that the first defendant got this amout by effecting two sales of properties one week and one month prior to that date

The learned counsel for the appellants submits rightly that if there was any consideration for Exhibit B-1, it would have been paid before the Sub-Registrar, in which case there would have been a registration endorsement to that effect and that it is not probable that it would have been paid one hour before the time of registration of the document. He also submits that the first defendant has not produced any evidence to show that he had held properties one week or one month prior to the date of registration of Exhibit B-1 and was in a position to pay a consideration of Rs. 4,000 for the sale. It may also be noted that if the second defendant had received the consideration of Rs. 4,000 for the sale, it is not probable that he would have made the aforesaid five applications from time to time for adjournment of the sale paying small amounts on each of those occasions and saying that he required the time to enable him to realise the money by harvest and pay the same. It cannot be stated that there is no substance in these submissions of the learned counsel for the appellants.

5. The sale under Exhibit B-1 was made in this case on 14th May, 1962 after the attachment of the properties sometime prior to 21st April, 1962 for the costs due under the decree in O.S. No. 137 of 1952. There was also a decree for mesne profits which came to be ascertained as Rs. 1,633.25 on 8th August, 1964.

6-7. Venkatarama Ayyar, J., has observed in *Naniams* v. *Rangappa*[1], that:

"It was next contended that the sale under which the 3rd defendant claims was in execution of a decree for costs passed in favour of the 4th defendant in O.S. No. 78 of 1937 on 3rd March, 1937, that that was not a debt which was in existence on the date of the gift in favour of the appellant on 5th August, 1932 and that, therefore, the 4th defendant was not himself entitled to avoid the deed of gift under section 53 and that the auction-purchaser succeeding to his rights could not claim higher rights. But the decree for costs was passed in an action for specific performance of the agreement dated 20th July, 1935 which in turn was for the discharge of the promissory note dated 25th July, 1932. The decree can, therefore, be ultimately traced to a debt which was in existence on the date of the deed of gift. Apart from that, under section 53 of the Transfer of Property Act it is not merely the creditors who are in existence at the date of the transfer but also subsequent creditors that are entitled to avoid it. Therefore, it could not be stated that the alienation was not made to avoid the creditors in the present case. The alienation has been made on 14th May, 1962. There is no satisfactory evidence to show that the first defendant was put in possession of the properties on the date of the sale. The first defendant has produced only one kist receipt (Exhibit B-2) dated 6th February, 1966, which has been issued to the first defendant in respect of survey numbers 10 and 313, which are not the suit properties. There is, therefore, no satisfactory evidence to show that the first defendant was in possession of the properties in pursuance of the alienation under Exhibit B-1, although the learned District Munsif has observed in paragraph 8 of his judgment that as far as the kist receipts are concerned P.W. 1 himself has admitted in the box that the first defendant has been paying kist for the past 6 or 7 years. There appears to be a mistake in the admission by P.W. 1 in view of the fact that that the first defendant has not produced any kist receipt to prove that he paid any kist for the suit properties.

8. There was undoubtedly delaying the creditors in this case as the second defendant had filed five applications for grant of time and the claim petition had been filed only on 27th October, 1965 long after the dismissal of E.P. No. 341 of 1962 in which the properties had been attached some time prior to 21st April, 1962 and after the properties were attached once again in the subsequent E.P. No. 199 of 1965 on 6th April, 1965.

9. The learned Subordinate Judge has observed in paragraph 13 of his judgment that it may be that the second defendant had a bad intent when he negotiated with the first defendant and sold his properties under Exhibit B-1. But so long as there is no evidence and proof that the first defen-

1. (1953) 2 M.L.J. 737 at 742 : 66 L.W. 729: A.I.R. 1954 Mad. 173.

dant also knew of such intent on the part of the second defendant, the first defendant had acted in good faith and purchased the properties for consideration, and the transaction under Exhibit B-1 cannotbe approved. He has,thus thrown the burden on the appellants or proving that the first defendant was aware of the intent of the second defenant to defeat and delay the creditors. But the Supreme Court has observed in *Abdul Shukoor Saheb* v. *Pappa Rao*[1] as follows :

> " Where fraud on the part of the transferor is established, *i.e.*, by the terms of paragraph (1) of section 53 (1) being satisfied, the burden of proving that the transferee fell within the exception is upon him and in order to succeed he must establisht hathe was not a party to the design of the transferor and that he did not share the intention with whichthe transfer had been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. When once the conclusion is reached that the transfer was effected with the intention on the part of the transferor to convert the property into cash so as to defeat or delay his creditors, there cannot be any doubt on the evidence on record that the plaintiff shared that intent. "

Therefore, it would appear in cases of this kind, the burden of proving that the transferee did not share the intention of the transferor, who defeated the creditors by effecting the transfer, is upon the transferee and not upon the plaintiff who attacks the alienation as having been made with intent to delay and defeat the creditors.

10. With regard to the jurisdiction, of this Court to interfere with a case of this kind, where both the Courts below have agreed that the alienation was not made with intent to defeat and delay the creditors, the learned counsel for the appellants invited my attention to the decision in *Jogi Reddi* v. *Chinnabbi*[2], where the Privy Council has observed :

> "Their Lordships would further observe that all the Courts below seem to have thrown the onus upon the appellant of proving that the properties he claimed were his own, instead of placing it as it should be upon the plaintiff. It therefore appears to their Lordships that there is no question of fact so found that can be binding upon an Appellate Court on a second appeal ; and that it is necessary for them to consider what is the true position. "

It would appear from this decision of the Privy Council that where the decision has been rendered throwing the burden wrongly on a party, merely on that basis the Appellate Court in second appeal would have jurisdiction to go into the matter and consider the evidence in the case. Therefore, I agree with the learned counsel for the apppellants that this Court in second appeal has jurisdiction in the present case to go into the question whether on the evidence, the appellants have established that the alienation was made in this case to defeat and delay the creditors.

11. On the materials placed before me and referred to above, I find that the alienation under Exhibit B-1 in this case has been made with intent to defeat and delay the creditors of the second defendant, and allow this second appeal with costs throughout. No leave.

R.S. ——— *Appeal allowed.*

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1. (1964) 1 M.L.J. (S.C.) 49 : (1964) 1 S.C.J. 168 : (1964) 1 An. WR. (S.C.) 49 : A.I.R. 1963 S.C. 1150.

2. (1929) I.L.R. 52 Mad. 83 (P.C.) : 56 M.L.J. 165 : 56 I.A. 6 : 114 I.C. 5. A.I.R. 1929 P.C. 13.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

T. Muthukumaran .. *Petitioner**

v.

State of Tamil Nadu, represented by its Secretary to Government, Revenue Department, Fort St. George, Madras-9 and others .. *Respondents.*

Tamil Nadu Village Officers Service Rules (1970), rules 10 *and* 18 (b)—*Village Headman—Appointment of—Petitioner's appointment cancelled on appeal—Petition to State for revision—Dismissed without recording reasons—Recording of reasons whether obligatory—Rule* 18 (b) *and its scope.*

In this case, the revisional authority (the State) had refused to interfere with an order passed by the District Collector, on appeal, concerning the appointment of a village headman. The question was whether the State should have recorded reasons in writing for rejecting the petitioner's revision petition. *Held*: Under rule 10 of the Tamil Nadu Village Officers Service Rules, 1970, the recording of reasons had not been made obligatory on the part of the State in disposing of a revision petition when it was not annulling, modifying or reversing or remitting for reconsideration any appellate order. [*Para.* 3.]

Held, further, the benefit of Rule 18 (*b*) as to age limit can avail only those who were found fully qualified and appointed under the Board's Standing Orders on or before 16th December, 1970 and who continued to hold the post on 19th March, 1975. The rule cannot cover the case of a person like the petitioner in the writ petition who had held only a temporary appointment in a leave vacancy and not against a permanent vacancy and whose temporary service was not continuous from 16th December, 1970 to 19th March, 1975.

[*Para.* 4.]

* W.P. No. 6839 of 1975.

4th November, 1975.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Memorandum No. 6938/E-1/75-2 dated 1st October, 1975 of the Government of Tamil Nadu and quash the same.

V. Krishan, for Petitioner.

The Court made the following

ORDER.—The petitioner was one of the four applicants for the post of village headman of Senthurai village. The Revenue Divisional Officer, the third respondent herein, found that the petitioner and the fourth respondent had all the requisite qualifications, but that the petitioner is to be preferred for the reason that he had got previous experience of eleven years. On appeal by the fourth respondent, the second respondent cancelled the petitioner's appointment and appointed the fourth respondent instead as village headman on the ground that, as between the petitioner and the fourth respondent who had the requisite qualifications, the petitioner was over-aged and therefore, the fourth respondent was to be selected. Aggrieved against the order of the second respondent, the petitioner went before the first respondent, but without any success. The petitioner has now approached this Court for the issue of a writ of *certiorari* to quash the order of the first respondent which virtually affirms the order of the second respondent appointing the fourth respondent as village headman.

2. The two grounds of attack put forward by the learned counsel for the petitioner before me are:

(1) that the revisional authority, the first respondent herein has not recorded the reasons as to why the petitioner's revision is rejected; and (2) the District Revenue Officer, the second respondent, had erroneously proceeded on the basis that rule 18 (*b*) of the Tamil Nadu Village Officers Service Rules, 1970, will not apply to the petitioner's case and therefore, the age qualification prescribed under the said rule cannot be applied in the case of the petitioner.

3. As regards the first contention, the learned counsel refers to rule 10 of the said Rules and states that it is obligatory for the first respondent to record reasons in writing while disposing of a revision petition filed before it. But, a perusal of rule 10 (4) indicates that the Government may call for and examine the records relating to any order passed on appeal by the District Collector and, for reasons to be recorded in writing, annul, modify or reverse or remit for reconsideration such order on any of the grounds specified in sub-rule (5) of rule 10. Sub-rule (5) sets out the grounds on which the order may be annulled, modified or reversed or remitted for reconsideration. In this case, the revisional authority has refused to interfere with the order passed by the District Collector on appeal. The question is whether the first respondent should have recorded reasons in writing for rejecting the petitioner's revision petition. The recording of reasons has been made obligatory under the rule only when the order appealed against is annulled or modified or reversed or remitted for reconsideration. The recording of reasons for annulling, modifying or reversing or remitting for reconsideration any appellate order is necessary as the statute itself sets out the grounds on which an order could be annulled, modified or reversed or remitted and one must know as to which of the grounds set out in the sub-clauses of sub-rule (5) have been relied on by the revisional authority for the purpose of annulling, modifying or reversing or remitting for reconsideration of the appellate order. But, the recording of reasons has not been made obligatory on the part of the first respondent when it is not annulling, modifying or reversing or remitting for reconsideration any appellate order. I cannot, therefore, accept the contention of the learned counsel for the petitioner that the order in question is vitiated for the reason that the Government has not set out the reasons for rejection of the petitioner's revision petition in the impugned order.

4. As regards the second contention that the age restriction cannot be put against the petitioner in view of rule 18 (*b*), it is admitted that the petitioner is 42 years of age and that if rule 18 (*b*) is not applicable to him, he cannot be considered for appointment as village headman under the said rules. The main contention is whether the petitioner can invoke rule 18 (*b*) so as to get over the age restriction set out in rule 8. In this context, the undisputed fact is that the petitioner was appointed as a temporary village headman in the same village in the leave vacancy for a long period, but was not continuously for the period from 16th December, 1970 to 19th March, 1975 as required in rule 18 (*b*). There was a break of twenty-eight days and therefore, the second respondent has taken the view that the petitioner is not entitled to the benefit of rule 18 (*b*). The learned counsel for the petitioner submits that though there was an interruption for a period of twenty-eight days in the temporary service of the petitioner, that should be ignored and he should be taken to have been in continuous temporary service from 16th December, 1970 to 19th March, 1975. According to the learned counsel, the rule does not contemplate a continuous service from 16th December, 1970 to 18th March, 1975 and what it contemplates is a temporary service which is substantially continued upto 19th March, 1975. Rule 18 (*b*), so far as it is relevant, is extracted below:

> "Nothing contained in these rules shall apply to persons who, on 16th December, 1970 were fully qualified under the Board's Standing Orders applicable to the areas not governed by the statute and their appointment had been made by the authority competent under the Board's Standing Orders and are holding the posts of village headman or additional village headman, village karnam or additional village karnam temporarily against permanent vacancies and continue as such on 19th March, 1975 and they shall be deemed to have been appointed on a permanent basis."

The learned counsel for the petitioner does not claim that the petitioner's temporary appointment made before 16th December, 1970 in this case should be taken to have been made on a permanent basis as has been provided in the last sentence of the said sub-rule. But, he relies on this sub-rule only for the purpose of getting over the age restriction contained

in the Rules. The rule, as extracted, clearly shows that persons who were found fully qualified and appointed under the Board's Standing Orders on or before 16th December, 1970 and who continue to hold the post on 19th March, 1975 are not to be governed by the restriction contained in these rules. First of all, the petitioner's earlier temporary appointment was in a leave vacancy and not against a permanent vacancy. As a matter of fact, the admitted break in the service of the petitioner as temporary village headman was only because the permanent incumbent joined duty and as a result thereof the petitioner had to go out. The permanent vacancy had, in fact, arisen only on 6th December, 1973 consequent on the resignation of the last office-holder. Therefore, I am of the view that for two reasons the petitioner cannot claim to be covered by rule 18 (*b*). Firstly, he has not been appointed in a permanent vacancy on a temporary basis; secondly, his temporary service was not continuous from 16th December 1970 to 19th March, 1975 as contemplated by rule 18 (*b*).

5. Thus, the two contentions raised by the petitioner have failed. The writ petition is therefore dismissed.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Mrs. T. R. Faria .. *Petitioner**.

Succession Act (*XXXIX of* 1925), *section* 2 (d)—"*Indian Christian*"—*Definition of*—*Anglo-Indian*—*Whether an "Indian Christian"*—*Petition by Anglo-Indian for succession certificate*—*If maintainable.*

The petitioner seeking succession certificate was an Anglo-Indian. The objection by the office was that the petition is not maintainable. The definition of "Indian Christian" under section 2 (*d*) of the Indian Succession Act would not enable an Anglo-Indian to file a petition for succession certificate. The proper remedy would be to apply for letters of administration in view of sections 212 and 219 of the Act. [*Para.* 1.]

R. Mohan, for Petitioner.

The Court made the following

ORDER.—An interesting question has arisen before me by reason of the office note.

The Petitioner seeking a succession certificate is an Anglo-Indian. The objection of the office is that the petition is not maintainable, because the definition of "Indian Christian" under section 2 (*d*) of the Indian Succession Act, would not enable an Anglo-Indian to file a petition for succession certificate. The proper remedy would be to apply for letters of administration, in view of sections 212 and 219 of the Act. *Prima facie* I am inclined to agree with the office note. However, what Mr. R. Mohan, learned counsel, would urge is that if Anglo-Indians are excluded from the purview of the Indian Succession Act for obtaining succession certificate, it would constitute a discrimination within the meaning of Article 14 of the Constitution of India. I am afraid I cannot decide this point at this stage. Certianly, it will be open to the petitioner to file a writ petition challenging the provisions of the Indian Succession Act on the ground of inequality, by means of a writ petition. To enable him to do so, this matter will stand adjourned by one month. Till then, the original petition will be kept pending. Of course, it will be open to the applicant to file a petition for the issue of letters of administration.

R.S. —— *Ordered accordingly.*

*Diary No. 8275 of 1975. *18th December*, 1975.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ., and S. Natarajan, J.*

Revenue Divisional Officer, Madurai-13 .. *Appellant**

v.

Pushpam and others .. *Respondents.*

Tamil Nadu Panchayats Act (XXXV of 1958), sections 15 (4), 147—Panchayat—Co-option of woman member by majority resolution—Complaint by a member—Cancellation of resolution by Inspector under section 147—Validity—Co-option amounts to election—Challengeable only by election petition.

In accordance with section 15 (4) of Tamil Nadu Act XXXV of 1958, a woman member was co-opted to a panchayat by a majority resolution. On a complaint made by a member, the Inspector, in exercise of his powers under section 147, cancelled the resolution. On a petition by the aggrieved co-opted member under Article 226 of the Constitution, the Inspector's order was set aside and it was held that the proper remedy against the resolution was to file an election petition. On appeal against the order,

Held, co-option in this case did involve election in its full sense and the result of the election could be called in question only through an election petition. Though co-option was done by a resolution of the panchayat, in the context of the statutory provisions and the rules it was not within the power of the Inspector under section 147 to review or rescind the resolution of co-option. [*Para.* 6.]

Cases referred to:—

Govindaswamy v. *Palaniswamy*, (1964) 77 L.W. (S.N.) 56; *U.K.N. Raju* v. *Nacharammal*, (1964) 77 L.W. 452; *Manammal* v. *Sesha Mudaliar*, (1963) 1 M.L.J. 94; *Shanmugavadivu Ammal* v. *K. V. Subramanian and others*, C.R.P. No. 1119 of 1971.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ramaprasada Rao, dated 25th October, 1972 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 303 of 1971 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the proceedings R.O.C. No. P.3/46497 of 1970, dated 29th December, 1974 of the Revenue Divisional Officer, Madurai-13 and quash the same.

S. Ramalingam, Assistant Government Pleader, for Appellant.

G. Nagarajan for *R.G. Rajan* and *V. Radhakrishnan*, for 1st Respondent.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This appeal is directed against an order of Ramaprasada Rao, J., who held that co-option of a woman member to a Panchayat under the provisions of the Tamil Nadu Panchayats Act (XXXV of 1958) is an election, though it took the form of a resolution of the Panchayat. On that view, he held that the Inspector of Panchayats acted in excess of his jurisdiction under section 147 of the Act in rescinding the resolution. We find ourselves in agreement with this decision of the learned Judge.

2. This case relates to Pechikulam Panchayat, Madurai District. The Panchayat had a strength of seven, each of whom was elected. But there was no woman among them. In accordance with section 15 (4), the first respondent was by a majority resolution of the Panchayat at a meeting held on 25th September, 1970 co-opted. On a complaint made by one of the members of the panchayat, the Inspector, in exercise of his powers under section 147 cancelled the resolution on 29th December, 1970. The ground was that there was a fraudulent counting of the votes on the resolution. We are not at the moment concerned with this aspect. The aggrieved co-opted member successfully petitioned to this Court under Article 226 of the Constitution, Ramaprasada Rao, J., holding that the proper remedy for any aggrieved member against a resolution was to file an election petition and not to have it rescinded by the Inspector under section 147.

* W.A. No. 220 of 1973.

15th July, 1975.

3. On the character of such co-option, we find a degree of divergence of opinion in this Court. In *Govindaswamy* v. *Palaniswamy*[1], *U.K.N. Raju* v. *Nacharammal*[2] and *Manammal* v. *Sesha Mudaliar*[3], which was a decision of Ramaprasada Rao, J., himself, the view taken was that because there is no positive indication in section 15 (4) co-option did not involve a process of election and it was therefore competent for the Inspector to rescind it as any other resolution of a panchayat. In the first of these cases, Anantanarayanan, J., as he then was partly derived support from an old Government Order, which was not statutory. Srinivasan, J., in the second case, contented himself by merely confining himself to the language of sub-section (4) of section 15. He thought that whereas the other provisions in the Act indicated election of members, sub-section (4) of section 15 did not necessarily connote the elective process. Ramaprasada Rao, J., in the third case merely followed the earlier decisions. Gokulakrishnan, J., in *Shanmugavadivu Ammal* v. *K.V. Subramanian and others*[4], reviewed these cases, but considered that in view of the rules framed under section 178 (1) relating to co-option, he should think that co-option amounted to an election. Ramaprasada Rao, J., in the instant order on which the appeal before us arises concurred with him.

4. As we indicated, in our opinion, the later view in the correct one and we would be prepared to hold so even without the rules. Section 14 contemplates a panchayat to be an elected body, for it says the members of the panchayat shall be elected in the manner prescribed. The proviso to this section is rather significant because a co-opted member for purposes of this section is also regarded as one among the elected members. The statutory understanding through section 14 itself is that co-option involves election and the member co-opted is an elected member of the panchayat. Nowhere in the Act do we find any justification that a panchayat member is ushered into the panchayat otherwise than by election which need not necessarily be always by the same kind of process. Section 15 deals with a variety of matters which include reservation of seats for members of the Scheduled Castes, Scheduled Tribes and co-option of women. The last item to wit, co-option of women would arise only if the panchayat elected does not happen to have a woman member. In that case, the panchayat is enjoined, it is indeed entitled to co-opt to itself one qualified woman. When it speaks of panchayat's entitlement to co-opt, to our mind, it at once implies the consensus of the members in their entirety, or of the majority of those members, which is ascertained by a process of vote taking. That is what precisely the word "co-option" means ordinarily. For instance the Concise Oxford Dictionary says that co-opt means elect into a body by votes of existing members. The word is derived from *optare* which means choose and the choice necessarily involves ascertaining the wishes of each of the members of the panchayat already elected into the body politic. In this respect, we have, therefore, to differ from the view expressed by Srinivasan, J., who, as we said was unable to find any elective process in the contemplation of sub-section (4) of section 15.

5. Quite apart, the Government have in exercise of their powers conferred by sections 178 and 179 (1) of the Act framed rules for election of presidents and vice-presidents of panchayats. An examination of these rules leaves no room for doubt that presidents and vice-presidents are elected by the ordinary process of elction with all its trappings. By G.O.No.1553, Rural Development and Local Administration Department, dated 21st June, 1966 the Government have directed that co-option of a woman member to a panchayat shall be made after the election of the president and the vice-president of the panchayat and that the procedure prescribed for the election of a vice-presdient of a panchayat shall apply to the co-option of a woman member to the panchayat. This direction has the force of law because it was done in exercise of the powers under section 178 (1). In our opinion, this rule merely brings out

1. (1964) 77 L.W. (S.N.) 56.
2. (1964) 77 L.W. 452.
3. (1963) 1 M.L.J. 94.
4. C.R.P. No. 1119 of 1971.

what the statutory provisions themselves imply.

6. To reiterate, we hold that co-option in this case did involve election in its full sense and the result of the election can be called in question only through an election petition. Though co-option is done by a resolution of the panchayat, in the context of the statutory provisions and the rules we have referred to, it is not within the power of the inspector under section 147 to review or rescind the resolution of co-option.

7. The appeal is therefore dismissed. No costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C.J., and S. Natarajan J.*

State of Madras by the Secretary to Government R.D. and L.A. Department, Madras-9 and another .. *Appellant**

v.

Deivasigamani Pillai .. *Respondent.*

and

The State of Madras represented by the Land Acquisition Officer and Revenue Divisional Officer, Tirukoilur, South Arcot District. .. *Appellant*

v.

Balakrishna Pillai .. *Respondents*

Land Acquisition Act (I of 1894), sections 4 (1) 6—Notification as to land sought to be acquired —Objections overruled—Declaration under section 6 made—Issue of erratum to declaration restricting acquisition to superstructure and well on the land—Validity—Notification held bad.

By a notification under section 4 (1) of the Land Acquisition Act certain pieces of land were sought to be acquired. Objections filed were overruled and a declaration under section 6 was published. Thereafter an erratum to the declaration was published stating that what was sought to be acquired was not land but only a superstructure and well. This was quashed on a petition under Article 226 of the Constitution. On appeal by the State,

Held: What was sought to be acquired must normally find a place in the notification under section 4 (1) of the Land Acquisition Act and it not having been made clear in the notification that what was sought to be acquired was only the superstructure on the view that the land was natham poramboke, the notification itself was bad and the issue of a mere *erratum* to the declaration would not cure this defect. Both the notifications under section 4 (1) and the declaration under section 6 would have to be quashed. [*Para.* 1.]

W.A.No. 133 *of* 1974.—Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Ramaprasada Rao, dated 23rd October, 1972 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 4507 of 1970 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the first respondent in G.O.R. No. 794, L.A. and G.O.R. No. 862, L.A., and quash the notification and declaration dated 18th April, 1964 and 13th June, 1967.

W.A.No. 186 *of* 1974.—Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Palaniswamy, dated 23rd December, 1970 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2520 of 1969 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the records on the file of the respondent in G.O.R. No. 794, L.A. and G.O.R. No. 862 L.A., dated 18th April, 1964 and 13th June, 1967 respectively inclusive of and resulting in the Award No. 5 of 1968 on his file and quash the proceedings thereon as illegal and not to take any proceedings pursuant to his notice in Al. 30261 of 1961, dated 17th July, 1969 in pursuance of the said notification made under the Land Acquisition Act in regard to the same in G.O.R. No. 862, L.A.

*W.A. Nos. 133 and 186 of 1974. *11th September, 1975.*

dated 13th June, 1967 and as published in the *Fort St. George Gazette* as notification 11.2 No. 238 of 1967 at pages. 227 and 228 of Part II of section 2 of the *Fort St. George Gazette* and dated 30th August, 1967 (prayer amended as per order dated 16th December, 1970 in W.M.P. No. 3216 of 1970).

The Government Pleader, for Appellants.

K. Chandramouli, N. Subramaniam, S. Sitarama Iyer, S. Rajarama Iyer and *R.S. Venkatachari*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, CJ.—These appeals are from the orders of Palaniswamy, J., and Ramaprasada Rao, J. By a notification under section 4 (1) of the Land Acquisition Act certain pieces of land were sought to be acquired for a public purpose, to wit, for the construction of a mutton and vegetable market. One of the survey numbers sought to be acquired, which both the appeals cover, is R.S.No. 238/IA-IA-IA/1. The description in the notification is as follows:—

> "Natham Poramboke, R.S.No. 238-IA-I-A-IA/1, present enjoyers and interested persons: (1) Balakrishna Pillai, son of Andi Pillai, (2) Dhanammal, aged 10, (3) Rajeswari aged 7, (4) Sivapragasam aged 3, (Nos. 2 to 4 minors by guardian father No. 1)-0.13 acre (a thatched tea hotel and one well)".

Objections were filed by the respondent that the land was not natham poramboke, but belonged to them. But these objections were overruled. There was a declaration under section 6 on 30th August, 1967 which was published. Thereafter, on 28th May, 1968 an erratum to the declaration was published to the effect that what was sought to be acquired on the survey number was not the land itself but the thatched tea hotel and also well. It is this notification that was quashed by Palaniswamy, J. He found:

> "On the facts proved by the petitioner and found by the acquisition officer, it follows that the petitioner and his predecessors in title have been in possession of the land, upon which the present superstructure stands, for over the prescriptive period. The petitioner is thus entitled to both the land and the superstructure. What is sought to be acquired, is only a part of his interest which is not contemplated under the Act. In this view, the entire acquisition proceedings including the notification under section 4 have to be struck down as being incompetent."

In the appeals filed by the Government it is rightly contended that the learned Judge went outside the purview of the petition under Article 226 of the Constitution to decide a question of title as to land. From the excerpt from the judgment, it is obvious that the learned Judge did go into the question of title and gave a declaration that the land belonged to the respondent. This is entirely outside the purview of the petition. The question of title will have to be decided in the light of evidence, especially the question of possession, which could not be satisfactorily decided only on the basis of affidavits in support of the petition asserting or denying title. It is no doubt true that the Government sought to decide the objections and overrule the same after section 4 (1) notification and before the declaration under section 6. We are not called upon to say whether this was proper or not. But the erratum was only to the declaration. That would be wrong. What was sought to be acquired must normally find a place in the notification under section 4 (1) and it not having been made clear in the notification that what was sought to be acquired was only the superstructure on the view that the land was natham poramboke, the notification itself was bad and the mere erratum to the declaration will not cure this defect. On that ground we agree with the learned Judge that both the notification under section 4 (1) and the declaration under section 6 will have to be quashed. But the appeals are well-founded inasmuch as the learned Judge went outside the purview of the writ petitions and gave a declaration as to the ownership of the land. That is set aside. To that limited extent the appeals are allowed. No costs.

S.J. ——— *Appeals partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ.* and *S. Natarajan, J.*

The Corporation of Madras by its Commissioner, Ripon Buildings, Madras-3. .. *Appellant**

v.

C. Kuppuswamy .. *Respondent.*

Madras City Municipal Corporation Act (IV of 1919), sections 86 and 349—No bye-laws made—Tax Collector—Failure to collect arrears of tax—Commissioner ordering recovery from the Tax Collectors pay—Order incompetent.

The Commissioner of the Corporation of Madras ordered the recovery of a portion of the property tax which had fallen into arrears and become time-barred from the pay of a tax-collector on the ground that the tax-collector had neglected to collect the same. The order was quashed on a petition by the tax-collector under Article 226 of the Constitution. On Letters Patent Appeal by the Corporation,

Held: When legislative provision vested power in a public authority and directed that it should be exercised in a particular manner prescribed, in this case through by-laws, the power could not be exercised in any other way unless the particular instance fell within the opening words of section 86 (1) of the Madras City Municipal Corporation Act. [*Para.* 1.]

The power under section 91 of the Act would not avail the Commissioner of the Corporation to make the order because it was related to the duties of the Corporation establishment and not to discipline which was specifically found in section 86 though in the situation, rather unfortunate, one could not escape from it, to wit, there was no power for the Commissioner to impose the punishment which he had done. [*Para.* 1.]

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice K. N. Mudaliyar, dated 29th March, 1973 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2451 of 1972 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the Respondent in proceedings R.D.C. No. 11 of 1971, dated 26th May, 1972 and quash the said proceedings of the Respondent dated 26th May, 1972.

R. Thillai Villalan, for Appellant.

R. Krishnamurthy, D. Raju and *A.R. Lakshmanan,* for Respondent.

The Judgment of the Court was delivered by

Veeraswami, CJ.—We agree with Mudaliyar, J., that the Commissioner of the Corporation did not possess the power to make the order which he did on 26th May, 1972 directing recovery from the respondent, a tax collector of a sum of Rs. 9,580.48, which represented his share of the property tax which he neglected, according to the Commissioer, to collect in spite of instruction and indeed allowed the same to become time barred. A memorandum dated 12th October, 1971 was served on the respondent which mentioned the still remaining arrears of tax and the fact that they became time-barred, and called upon him to furnish his report within three days. As he failed to comply with this requirement, on 30th December, 1971, the following charges were framed by the Revenue Officer:

> "1. That they have (another also was involved) failed to carry out the instruction contained in the circular and memo. cited;
>
> 2. That due to their utter neglect, inordinate delay has been caused and a huge amount of Rs. 23,183.56 is still outstanding as time-barred arrears for 1/68-69."

An explanation was asked for to be submitted within three days and since this was not done and further time was refused, came the impugned order. It said that a sum of Rs. 14,370.71 was still outstanding in the arrears demand register not covered by any action, and proceeded :

* W.A. No. 143 of 1974.

22nd *September*, 1975.

"It is therefore ordered that the total amount of Rs. 14,370.71......is recovered from the assessor and tax collector in the ratio of 1:2 (i.e.,) share of Rs. 4,790.23 from Thiru P.S. Balasubramaniam, assessor, and 2/3rd share of Rs. 9,580.48 from Thiru C. Kuppuswamy, tax collector at Rs. 50 per month from their salary for May, 1972 payable on 1st June, 1972 and onwards till the entire-amount is recovered."

Mudaliyar, J., quashed this order on the ground that the Commissioner did not have the power to make the order. In the appeal before us, counsel relied on sections 86 and 91 of the Madras City Municipal Corporation Act, 1919. Section 86—relates to conditions of service of Corporation establishment.. Save as otherwise provided in the Act, discipline of a Class III employee will be regulated by by-laws made by the council under section 349. That section undoubtedly vests power in the council to make bye-laws in respect of all matters expressly required or allowed by the Act to be provided by by-law. Though no specific power to frame by-law in respect of discipline of employees has been set out in section 349, it may well be said that the general power in sub-section (1) of that section will enable the council to cover the matter by a by-law. Unfortunately this has not been done so far; no by-law has been framed. When legislative provision vests power in a public authority and directs that it should be exercised in a particular manner prescribed, in this case through by-laws, the power cannot be exercised in any other way unless the particular instance falls within the opening words of section 86 (1). Our attention has not been invited to anything showing that the matter of discipline and its conduct has been provided for elsewhere in the Act. The only other section to which our attention has been invited is section 91. That again only vests in the Commissioner powers of supervision and control over the establishment, and even this is controlled by by-laws and regulations for the time being in force and subject to the other provisions of the Act as well as the rules framed thereunder. Here again, this power will not avail the Commissioner to make the order because it is related to the duties of the Corporation establishment and not discipline which is specifically found in section 86. Though in the situation rather unfortunate, one cannot escape from it, to wit, there is no power for the Commissioner to impose the punishment which he has done. That will suffiice to sustain the order of Mudaliyar, J.

2. On that view, it is not necessary to examine whether the order of the Commissioner will be vitiated on any other ground, as for instance, for want of adequate application of his mind to what precisely was the guilt of the respondent, because non-collection of arrears may be due to either the negligence of the respondent, if there was any, or in spite of his diligence, default on the part of the assessee and so on. The Commissioner does not appear to have addressed himself to this question; nor given a finding that there was any laches on the respondent beyond failure to make reports about the arrears. In any case, we are not on that question. The appeal is dismissed with costs. Counsel's fee Rs. 100.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

M.E. Subramani and others

.. *Petitioners**

v.

The Commissioner, Hindu Religious and Charitable Endowments (Administration) Madras-34 and others

.. *Respondents*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), section 45—Group of temples—Appointment of Executive officer by Commissioner, Hindu Religious and Charitable Endowments—Section 45 whether gives unguided and arbitrary power—"Subject to such conditions as may be prescribed"—Whether a condition precedent—"As may be prescribed", meaning of—Issue of show cause notice to existing trustees not necessary.

Section 45 of the Tamil Nadu Hindu Religious and Charitable Endowments Act

*W.P. No. 6867 of 1975

6th November, 1975.

could not be taken to confer an unguided or arbitrary power on the Commissioner. The power under the section has got to be exercised in terms of the policy of the Act *i.e.*, to provide for the administration and governance of the religious and charitable institutions and endowments under the State. In the instant case, the Commissioner had specifically stated in the order appointing the Executive Officer that the power had been exercised for the better and proper administration of the group of temples. This is not, in any way, either irrelevant or extraneous.
[*Para*. 4.]

Having regard to the language used in section 45, it was not possible to construe the words, "subject to such conditions as may be prescribed" as being a condition precedent for the exercise of the power under section 45 (1). If the conditions have been prescribed, then, the power had to be exercised only subject to those conditions. But, if the conditions were not prescribed, it could not be said that the power could not, at all, be exercised. The expression "as may be prescribed" occurring in the section indicated that the rule-making authority might or might not prescribe the conditions. If no conditions were prescribed, then, the power of the Commissioner could be exercised without any restriction, of course, subject to the other guidelines indicated by the policy and object of the Act. [*Para*. 5.]

Section 45 (1) does not, in terms, provide that the power could be exercised only after issuing a show cause notice to the existing trustees or after conducting an enquiry into the state of affairs of the temples.
[*Para*. 6.]

Case referred to :—

O. Radhakrishnan v. *Manickam*, (1974) 2 M.L.J. 179.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings in R. Dis. No. 59287 of 1975, dated 4th September, 1975 of the first respondent—Commissioner, Hindu Religious and Charitable Endowments, Madras and puash the order thereby made.

T.V. Subrahmanyam, for Petitioner.

The Court made the following

ORDER.—The petitioners are three of the non-hereditary trustees out of the five appointed for a religious institution comprising the Arulmigu Margasahaya Iswarar, Varasiddhi Vinayakar and Karunakara Perumal, etc., group of temples at Maduravoyal, Saidapet taluk, Chingleput District, by an order dated 27th August, 1973 of the Assistant Collector, Hindu Religious and Charitable Endowments. It appears that apart from the three trustees who are the petitioners herein, the other two are not effectively functioning as trustees. The 4th trustee is said to be a former managing trustee and he is said to be giving constant trouble to the petitioners who are said to be sincere in carrying out their duties as trustees. The 5th trustee is said to have resigned from the trusteeship.

2. The first respondent herein, in exercise of his powers under section 45 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, had appointed, by his order dated 4th September, 1975 the third respondent as the Executive Officer of the group of temples in question. The petitioners have challenged, in this writ petition, the validity of the said appointment.

3. According to the petitioners, the order appointing the third respondent as the Executive Officer of the group of temples in their charge, is invalid for 3 reasons *viz*.,

(1) Section 45 does not give any indication as to when and in what circumstances the power of appointing an Executive Officer should be exercised and therefore, the power under that section cannot, validly, be exercised as it is unguided and arbitrary;

(2) Section 45 enables the Commissioner to appoint an Executive Officer for a religious institution subject to such conditions as may be prescribed and therefore, so long as the conditions contemplated by that section have not been prescribed by the State Government, the Commissioner

has no jurisdiction to exercise that power contained in that section ; and

(3) In any event, the Commissioner cannot, by his order, appoint an Executive Officer under the said section without giving any show cause notice to the existing trustees or without giving any finding that their management is defective.

4. As regards the first contention, the learned counsel points out that section 45 cannot be taken to have conferred on the Commissioner an unguided and arbitrary power to appoint an Executive Officer to a religious institution, that the mere statement in the impugned order that it is for the better administration of the temples, is quite insufficient, and that the Commissioner must find that there are circumstances warranting him to appoint an Executive Officer. I am of the view that section 45 cannot be taken to confer an unguided or arbitrary power on the Commissioner, that the power under the section has got to be exercised in terms of the policy of the Act *i.e.*, is to provide for the administration and governance of the religious and charitable institution, and endowments, under the State of Tamil Nadu. If, in fact, the Commissioner exercises the power under section 45 on extraneous or irrelevant considerations, then, the particular exercise of the power can be challenged as being outside the purview of section 45. In this case, the first respondent has specifically stated, in the order appointing the executive officer, that the power has been exercised for the better and proper administration of the group of temples. I cannot say that this is, in any way, either irrelevant or extraneous. I cannot, therefore, hold that the impugned order passed by the first respondent is, in any way, arbitrary.

5. Regarding the second contention that since no conditions have been prescribed by the rules subject to which the power under section 45 has to be exercised, the Commissioner cannot exercise the power, the learned counsel states that the prescribing of the conditions is a condition precedent for the exercise of the power under section 45 (1). In support of this contention, learned counsel places reliance on a decision of this Court in *O. Radhakrishnan and another* v. *Manickam and others*[1]. In that case, the Court had to consider the scope of section 65 (4). Section 65 (4) enables the Commissioner to modify or cancel an existing scheme in respect of a mutt or a specific endowment subject to such conditions and restrictions as may be prescribed. But, this was subject to the following proviso, *viz.*. "Provided that such cancellation or modification of a scheme in force shall be made only subject to such conditions and restrictions as may be prescribed". In the context of the said provision, the Court held that, as the language in section 65 (4) (*a*) of the Act stands, the Commissioner has no power to modify or cancel a scheme on an application made by a party and that the power conferred on the Commissioner has to be exercised *suo motu* only. The Court also held that so far as the proviso to section 65 (4) (*a*) is concerned, it does not provide merely a mode of exercising the power, but it really constitutes a restriction or circumscription on the exercise of the power itself and, therefore, without there being the prescription therefor, the power itself is incapable of being exercised. The language of section 65 (4) (*a*) specifically says that the power of modification or cancellation of an existing scheme under section 65 (1) shall be exercised only subject to such conditions and restrictions as may be prescribed and it is because of that peculiar wording, the proviso was construed as limiting the power under section 65 (1). But, section 45 (1) is in a different form. It says "The Commissioner may appoint, subject to such conditions as may be prescribed, an Executive Officer for any religious institution, either a mutt or specific endowment attached to a mutt". Having regard to the language used in this section, it is not possible to construe the words "subject to such conditions as may be prescribed" as being a condition precedent for the exercise of the power under section 45 (1). If the conditions have been prescribed, then, the power has to be exercised only subject to those conditions. But, if the conditions are not prescribed, it cannot be said that the power cannot, at all, be exercised. The power conferred on the Commissioner to appoint an

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1. (1974) 2 M.L.J. 179.

executive officer by the Legislature cannot be said to have been taken away by the failure or inaction on the part of the Government to prescribe the conditions. The expression "as may be prescribed" occurring in the section indicates that the rule-making authority may or may not prescribe the conditions. If the conditions are prescribed, then, the power under section 45 (1) is subject to those conditions. But, if no conditions are prescribed, then, the power of the Commissioner can be exercised without any restriction, of course, subject to the other guidelines indicated by the policy and object of the Act. In my view, the learned counsel is not right in his submission that section 45 (1) cannot be invoked by the Commissioner to appoint an executive officer so long as no conditions have been prescribed as contemplated by that section by the rule-making authority.

6. As regards the third contention that the impugned order is vitiated for the reason that the Commissioner has not given any show cause notice to the petitioners nor their administration has been found defective, it is seen that section 45 (1) does not, in terms, provide that the power can be exercised only after issuing the show cause notice to the existing trustees or after conducting an enquiry into the state of affairs of the temples. In this case, the order proceeds on the basis that the appointment of an executive officer is necessary for the better and efficient administration of the temples. It has been recently held by this Court in Writ Petition No. 5215 of 1975 that if the Commissioner finds that the appointment of an executive officer for a particular religious institution is necessary for the better and efficient management of that institution, he can proceed to appoint the executive officer without any enquiry into the affairs of the temples or without any notice to the existing trustees. I have to, therefore, reject this contention of the counsel for the petitioner as well.

7. In the result, this writ petition is dismissed.

S J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ. and S. Natarajan, J.*

Mahalakshmi Ammal .. *Appellant**

v.

G. Vijayasubramaniam and others .. *Respondents.*

Will—Construction—"சர்வசுதந்திர பாத்யமாய்"—Meaning of.

By her will, a testatrix had bequeathed the B and E schedule properties to her second daughter for her lifetime, and after her, her grand-daughter *S* was to get the properties. As to this disposition the testatrix had said that *S* would enjoy the properties, சர்வசுதந்திர பாத்யமாய் but had added that after *S*, *S*'s heirs should get the properties in the two schedules absolutely with power of alienation. On the question as to the nature of the estate given to *S*, the learned Judge on second appeal on a reading of the entirety of the will and the pattern of the testatrix's intention, held that the words" சர்வசுதந்திர பாத்யமாய்" did not really express what it meant. On further appeal,

Held: Apart from the pattern of the testatrix's intention, one other fact was that she had directed not merely the life-estate holders but also the ultimate beneficiaries, namely, the great-grandchildren to clear her debts, if any, remaining undischarged. This could only show the intention of the testatrix that she meant the great-grandchildren as the ultimate destination of the properties.

On that view, (concurring with the learned Judge in second appeal) the expression "சர்வசுதந்திர பாத்யமாய்" occurring in the disposition in favour of "*S*" would not by itself be determinative of the quantum of the estate granted by the testatrix to her. [*Para.* 3.]

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of the Honourable Mr. Justice Raghavan, dated 25th November, 1971 and passed in S.A. No. 786 of 1969, preferred to the

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*L.P.A. No. 23 of 1972. 11*th August*, 1975.

High Court against the decree of the Court of the District Judge, Madurai, dated 30th January, 1969 and passed in Appeal Suit No. 278 of 1967 (O.S. No. 110 of 1965, Principal Subordinate Judge, Madurai).

A. Sundaram Iyer, for Appellant.

K. Thirumalai, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C J.—Differing from the concurrent findings of the first two Courts, Raghavan, J., on a construction of the last Will and Testament of one Rukmani Ammal, dated 9th December, 1934 held that the interest which Sundaram Ammal was given thereunder, was out a life interest, the remainder in B and E schedule properties being vested in the testatrix's great grandchildren by Sundaram Ammal. The testatrix died in 1935. She had two daughters, Muthumeenakshi Ammal, who died in 1961, and Sithalakshmi Ammal. who died in 1963. The first had two daughters, Sundaram Ammal, who died on 2nd June, 1965 and Subbu narasammal. Sithalakshmi Ammal had no issues. By the will, the testatrix gave the A schedule property to the eldest daughter Muthumeenakshi Ammal and her second daughter Subbunarasammal each for life without powers of alienation. After their lifetime the direction in the will was that Subbunarasammal's heirs should get the 'A' schedule property absolutely. B and E schedule properties were then next disposed of by the testatrix. She said that these properties might devolve on Sithalakshmi Ammal, her second daughter, and she should enjoy the property without any powers of alienation. After her lifetime, Muthumeenakshi Ammal's eldest daughter Sundaram Ammal should get the properties. As to this disposition the language employed by the testatrix is "*என் மூத்த குமாரத்தி முத்து மீனாட்சி அம்மாளுடைய முதலாவது குமாரத்தி சுந்தரம்மாள் சர்வசுதந்திர பாத்தியமாய் அநுபவித்து வந்து*" The will proceeded to say that after the lifetime of Sundaram Ammal, her heirs should get the properties in the two schedules absolutely with powers of alienation.

2. The first two Courts construed the disposition of the B and E schedule properties in favour of Sundaram Ammal as absolute so that they considered that the subsequent disposition in favour of her children being in conflict with the earlier disposition, the latter should give way to the former. In other words, the disposition in favour of the heirs of Sundaram Ammal was considered by the first two Courts as being repugnant to the earlier disposition. Raghavan, J., in Second Appeal, on a reading of the entirety of the will and the pattern of the testatrix's intention as appearing in paragraphs 5 and 6 as well as 8 of the will, considered that the words "*சர்வ சுதந்திர பாத்தியமாய்*" occurring in the disposition in favour of Sundaram Ammal did not really express what it meant. We are inclined to accept this construction of the will.

3. The pattern of the testatrix's intention appears to be to benefit eventually the great-grandchildren either through Sundaram Ammal or her sister Subbunarasammal. In the case of Subbunarasammal the testatrix has used clear language that she should get only a life interest and after her life, the remainder should vest absolutely in her heirs. When it comes to the great-grandchildren by Sundaram Ammal, we do not see why a different construction should be placed, her intention being plain, as we said, to benefit ultimately her great grandchildren. A great deal of stress has beeen laid on the expression "*சர்வ சுதந்திர பாத்தியமாய்*" while the testatrix gave an interest in the B and E schedule properties to Sundaram Ammal and it is contended that this meant that absolute interest in these schedule properties was given to her and that the subsequent disposition should be held be invalid, it being in conflict with the earlier one. But this contention does not satisfy the rule that in determining the intention of the testatrix, we have to look into the entire will and all the clauses in the will will have to be read together. It is only by that means the intention of the testatrix can be gathered satisfactorily. Apart from the pattern of the testatrix's intention we have one other fact that she has directed not merely the life estate

holders but also the ultimate beneficiaries, namely, the great-grandchildren, to clear her debts, if any, remaining undischarged. This can only show the intention of the testatrix that she meant the great-grand-children as the ultimate destination of her properties. On that view, we concur with Raghavan, J., that the expression "சால சுதந்திர பாத்தியமாய்" occurring in the disposition in favour of Sundaram Ammal would not by itself be determinative of the quantum of the estate granted by the testatrix to her. The appeal is, therefore, dismissed. No costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*C. J. R. Paul, J.*

Murthi Gounder ... *Petitioner**

v.

Karuppanna Gounder .. *Respondent.*

Civil Procedure Code (V of 1908), Order 8, rule 9, and section 151—Suit for declaration of title—Written statement filed—Issues framed and trial commenced—Subsequent request for filing additional written statement setting up new case—Rejection by trial Court justified.

Where, in a suit for declaration of title to the suit property, after the trial had commenced and two witnesses had been examined the defendants filed an application under Order 8, rule 9, Civil Procedure Code, for leave to file an additional written statement raising a new case and it was rejected by the District Munsif,

Held: Considering the stage at which such an application had been filed, undoubtedly, prejudice would be caused to the plaintiff who would now be forced to file a reply statement and as consequence thereof, fresh and different issues would have to be framed and the trial would have to begin once over again. Taking these circumstances into consideration the learned District Munsif rightly refused to permit the revision petitioner to file the additional written statement.

[*Para.* 9.]

*C.R.P. No. 2147 of 1974.

1*st October*, 1975.

Cases referred to :—

Shri Ram Eadarmal Didweim v. *Govinsbanka alias Rameshwar Johmal*, A.I.R. 1961 Bom. 136; *Vava Rowther* v. *Sulaiman Rowther*, (1930) 32 L.W. 61: 127 I.C. 292: A.I.R. 1930 Mad 814; *Md. Ibrahim* v. *Ahmed Maricar*, (1948) 2 M.L.J. 576: 61 L.W. 836 : A.I.R. 1949 Mad. 541.

Petition under section 115, Civil Procedure Code, praying the High Court to revise the Order of the Court of the District Munsif of Sankari at Salem, 10th June, 1974 dated and made in I.A. No. 537 of 1974 in O.S.No.1246 of 1972.

V. V. Sridharan, for Petitioner.

A. S. Venkatachalamurthy, for Respondent.

The Court made the following

ORDER.—This revision petition is against the order of the learned District Munsif of Sankari refusing to allow an application filed by the revision petitioner-first defendant under Order 8, rule 9 and section 151, Civil Procedure Code, to receive the additional written statement.

2. The suit filed by the respondent was for declaration of his title to the suit property which comprises of wet lands and for a permanent injunction restraining the defendants from interfering with his possession and enjoyment of the same.

3. The suit was resisted by the defendants, of whom the fifth defendant filed a written statement which was adopted by defendants 1 to 4. In that written statement, it is categorically admitted in paragraph 3 that the suit property belongs to the plaintiff and Muthuswamy and they are in enjoyment of the same. But later, on, it is stated that about seven months prior to the filing of that written statement, the entire villagers of Thanamuthiyar Village in Kurumbapaty Panchayat headed by a particular M.L.A. convened a meeting at the request of the villagers and decided to put up a pucca road from Idappadi-Konganapuram Main Road passing through several patta lands including that of the plaintiff, the defendants and certain others and it was decided that

the entire villagers should contribute for the formation of the road, except those pattadars in whose lands the new road has to be formed, and all the pattadars including the plaintiff agreed to that, and the new road was laid five months prior to the filing of the written statement, and it is being used by the entire villagers and the Panchayat had agreed to maintain this road.

4. Issues were then framed and the trial was commenced. It appears from the order of the learned District Munsif that after the examination of two witnesses on behalf of the defendants, the application under Order 8, rule 9 was filed for leave to file an additional written statement.

5. By the additional written statement, it is sought to be contended that actually, the suit pathway was a customary pathway and it has been in existence for well over 100 years and it was used by the villagers as of right and without any interruption and at the beginning of 1972, the villagers of Thana Moorthipalayam applied to the Kurumbpatti Village Panchayat for the laying of a pucca road and the Panchayat passed a resolution unanimously for laying the road and for maintaining the same and since some more lands of the pattadars were required for laying the pucca road sufficiently wide enough to admit hand carts, lorries, and other vehicles, the local M.L.A. and the Panchayat President approached the plaintiff, the defendant and some other pattadards to give portions of their lands for a public purpose and they consented to do so and after obtaining their consent, the Panchayat laid the road and as such the defendants have "acquired easement right by prescription by user of the suit cart track for well over 12 years" and the plaintiff is estopped from disputing the defendant's right to use the suit pathway and further the suit is bad for non-joinder of the Kurumbapatti Panchayat Board.

6. It may be noted that while in the original written statement, it is merely stated that the new road was laid only five months prior to the filing of the written statement and there was no whisper of the existence of any pathway or cart track at that place, it is now sought to be made out by the additional written statement that actually there was a cart track over the plaintiff's lands and that of others which was being used by the villagers for over 12 years as an easement and that the cart-track was widened after the plaintiff and other pattadars had given their consent to give portions of their land to the Panchayat for laying the road.

7. In the circumstances, the learned District Munsif found that by the additional written statement, the first defendant was trying to set up an entirely new case, after the examination of two witnesses on the side of the defendants. He has referred to the decision in *Ram Eadarmal Didweim* v. *Govins banka* alias *Rameshuar Johmal*[1], wherein it has been observed:

> "In the case of an amendment of the written statement, an amendment should not be entertained if it would convert the defence into another of a different inconsistent character".

The learned District Munsif further observed that the petition was highly belated and hence he refused to permit the first defendant to file an additional written statement.

8. Undoubtedly, a defendant is entitled to file a written statement containing inconsistent pleas. This has been made clear by the decision in *Vava Rowther* v. *Sulaiman Rowther*[2]. But certain other considerations would have to be taken into account when a petition is filed for permission to receive an additional written statement containing pleas, some of which are inconsistent with the pleas taken in the original written statement. As observed by Rajagopalan, J., in *Md. Ibrahim* v. *Ahmed Maricar*[3], where an apparently inconsistent plea is put forward in an additional written statement, it has to be considered whether

1. A.I.R. 1961 Bom. 136.
2. (1930) 32 L.W. 61 : 127 I.C. 292 : A.I.R. 1930 Mad. 814.
3. (1948) 2 M.L.J. 576 : 61 L.W. 836 : A.I.R. 1949 Mad. 541.

it is expedient with reference to the circumstances of the case to permit such a plea being put forward at that stage. In that case, the suit had not come up for trial and hence, Rajagopalan, J., observed "I am unable to see how the proposed additional plea, though inconsistent, would embarass the trial of the suit".

9. It is stated in the affidavit filed in support of the petition to receive the additional written statement that by inadvertence, some important pleas were omitted to be stated. It is stated by the learned counsel for the revision petitioner that from the Panchayat records, his client came to know that there was a cart-track in existence in the place where the present pucca road had been put up by the Panchayat. This is not a case where by mere inadvertence, certain pleas were not put forward. This is a case where nearly 2 years after having filed his written statement, the first defendant had acquired some further information and wanted to set up a case which is different from the case which he had originally set up in his written statement. Considering the stage at which such an application has been filed, undoubtedly, prejudice would be caused to the plaintiff who will now be forced to file a reply statement and as a consequence thereof, fresh and different issues will have to be framed and the trial would have to begin once over again. Taking these circumstances into consideration, I am of the view that the learned District Munsif rightly refused to permit the revision petitioner to file the additional written statement. I see no ground to interfere.

10. The petition is, therefore, dismissed.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Rajasekaran and others .. *Appellants**

v.

Elumalai Goundan and others .. *Respondents.*

(A) *Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 11—Land in "estate"—Claim for patta—Suit for declaration of title, injunction and possession—Civil Court's jurisdiction, if ousted.*

(B) *Madras Estates Land Act (I of 1908), section 3 (15)—"Ryot"—Definition of—Decision of settlement officer—Whether binding on civil Courts.*

(C) *Adverse possession—Tacking—When permitted.*

In determining the title to properties, the Civil Courts have jurisdiction to go into all the incidental questions including the character of the lands.

[*Para.* 10.]

The Madras Estates (Abolition and Conversion into Ryotwari) Act has not provided any machinery for the purpose of deciding a dispute between rival claimants for ryotwari patta under section 11 of that Act and any decision of the statutory authority on this aspect has no finality so as to bar the jurisdiction of Courts. There is no provision in the Abolition Act, which has impressed the decision of the statutory authority with any finality for all purposes so as to rule out decision by the Court's.

[*Para.* 13.]

The word "ryot" has been defined in section 3 (15) of the Madras Estates Land Act as meaning a person who holds for the purposes of agriculture ryoti land in an estate on condition of paying to the landholder the rent which was legally due upon it. Therefore, in order to be entitled to a patta in respect of a ryoti

*S.A. No. 999 of 1972.

21*st November*, 1975.

land, the land must be held for the purpose of agriculture. If the land was never cultivated it would not be ryoti land. The Estates Land Act is designed to protect agriculturists and not others. [*Para.* 14.]

Any decision in any proceeding under section 11 of the Estates Abolition Act would not be binding on a Civil Court. Similarly any decision under the provisions of section 18 or 19 of the Act with reference to grant of patta to buildings or vacant lands cannot also have a finality beyond the scope of examination by a civil Court. The finality under section 64-C of the Abolition Act is only for the purpose of the Act and has no effect in a suit for declaration of title. [*Para.* 15.]

A person claiming derivative possession from an earlier trespasser could tack on the period of adverse possession of the earlier trespasser. [*Para.* 21.]

A succession of trespassers claiming through one another (*e.g.*, as heir, legatee assignee, or otherwise) could, though the possession of each of them had extended to less than 12 years, add and tack the periods of their possession so as to defeat the right of the true owner. [*Para.* 21.]

Cases referred to :—

N. P. Ponnuswami v. *The Returning Officer, Namakkal Constituency, Salem District*, 1952 S.C.J. 100 : (1952) 1 S.C.R. 218: (1952) 1 M.L.J. 775: A.I.R. 1952 S.C. 64; *State of Madras, represented by the Collector of Ramanathapuram at Madurai* v. *Ramalingaswamigal Madam*, (1969) 2 M.L.J. 281 ; *State of Madras* v. *Balamanavala Reddiar*, (1972) 85 L.W. 141: A.I.R. 1973 Mad. 14; *T. M. Lakshminarayana Ayyar* v. *Nallachi Ammal*, (1974) 87 L.W. 276; *Sri Venugopala Rice Mill* v. *Raja of Pethagundam*, (1930) I.L.R. 53 Mad. 367 : 32 L.W 92 : 59 M.L.J. 74 : A.I.R. 1931 Mad. 194; *Sri Pallapalli Venkatarama Rao* v. *Musunuru Venkayya*, (1954) 2 M.L.J. 1 : 67 L.W. 354 : I.L.R. (1954) Mad. 715; *Alapati Venkataramiah* v. *Commissioner of Income-tax, Hyderabad*, (1965) 3 S.C.R. 567: (1965) 2 I.T.J. 164: (1965) 2 S.C.J. 283: (1965) 2 M.L.J. (S.C.) 9: (1965) 2 An.W.R. (S.C.) 9: A.I.R. 1966 S.C. 115; *Uthamaram Nathuram Sait* v. *Hude Gopalakrishnayya*, (1957) M.W.N. 112: A.I.R. 1957 Mad. 463; *Rajagopala Naidu* v. *Ramasubramaniya Ayyar*, (1935) M.W.N. 503: A.I.R. 1935 Mad. 449 ; *Baijnath* v. *Ram Bilas*, (1924) 80 I.C. 12; *Nomula Narasimha* v. *Vasan Mangamma*, (1925) 91 I.C. 556; *Gurbinder Singh* v. *Lal Singh*, (1966) 2 M.L.J. (S.C.) 8: (1965) 3 S.C.R. 63: (1966) 2 S.C.J. 157: (1966) 2 An.W.R. (S.C.) 8: A.I.R. 1965 S.C. 1553 .

Appeal against the Decree of the Court of the Subordinate Judge, Salem in A.S. No. 63 of 1970 preferred against the decree of the Court of the District Munsif of Salem in O.S. No. 167 of 1966.

T. Rangaswami Ayyangar, for Appellant.

K. Parasaran and *S. Jagadeesan*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs, who are the appellants and who are the father and sons filed a suit for declaration of title, injunction and possession in respect of four items of properties situated in the Pallapatti Zamindari in Salem. The lands originally formed part of Gundu Chetty Eri. In 1915 or 1916 a railway line was constructed to the south of these properties, with the result the flow of water towards these lands was interrupted. According to the plaintiffs these lands ceased to be the Eri land since then. The four items are in T.S. No. 7/3 measuring 10 cents; T.S. No. 7/4 measuring 19 cents. T.S. No. 7/5 measuring 22 cents and T. S. No. 7/9 measuring 67 cents. The father of the plaintiff had a rice mill in T.S. No. 6 and these lands were acquired from the Zamindar on 19th December, 1938. A receipt was passed for Rs. 649 paid by cheque for compensation for the land value for patta No. 152 of Pallapatti village. It may be mentioned herein that the rice mill is situate in patta No. 152. On 12th April, 1943 another receipt was executed by the Zamindarini by name Gnanambal saying that in respect of these lands lying west of survey No. 152 measuring 60 cents, a sum of Rs. 2,400 was received for the purpose of granting a patta and the amount was referred to as compensation. The receipt marked

as Exhibit A-25 was to be returned to the Zamindarini after the patta was granted. On 23rd July, 1945 a further receipt for Rs. 1,000 in respect of 10 cents of land adjacent to the 60 cents mentioned earlier was issued. In this receipt also it was declared that it was to be returned on the grant of patta. The plaintiffs claimed in the plaint that these properties had been sold by the Zamindarini to the first plaintiff's father, that the father was put in possession of the properties and that the parties owning a rice mill on the east of the suit properties enjoyed these lands as appurtenances. The rice mill along with the suit lands were alleged to have been leased to one Abboy Chetty in 1945 for a period of five years. As Abboy Chetty did not pay the rent properly, the father of the first plaintiff filed a suit in O.S. No. 244 of 1950 in the Court of the Subordinate Judge, Salem, and obtained a decree for possession. This decree was executed in R.E.P. No. 259/51 and delivery of possession was obtained in 1952 after removal of the obstructions. There was a partition on 27th May, 1952 between the first plaintiff and his father and it was alleged in the plaint that the first plaintiff was allotted a half share in the suit properties and the mill, the other half falling to his father. The father of the first plaintiff executed a registered will in favour of plaintiffs 2 and 3 in respect of the properties and died subsequently on 19th September, 1965. The plaintiff thus claimed to have become entitled to the whole of the suit properties.

2. The first plaintiff's father claimed patta for these lands under section 11 (*a*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, hereinafter called the "Abolition Act". His claim for patta was negatived upto the level of the Director of the Settlement. Thereafter the claim was considered under section 19-A of the Abolition Act on the proposal submitted by the Special Assistant Settlement Officer. Under that provision the Board directed the Special Assistant Settlement Officer to dispose of the claim of the petitioner under section 18 (4) of the Act. The Special Settlement Officer took up enquiries under section 18 (4) of the Act and he disallowed the claim on the ground that there was no building on the notified date and that consequently the claim would not fall under section 18 (4) of the Abolition Act. On revision the Director of Settlement confirmed the order of the Special Assistant Settlement Officer and on further revision the Board remanded the case in respect of the suit lands to the Settlement Officer, Salem, for fresh enquiry and disposal.

3. The Settlement Officer pointed out in his order dated 7th August, 1965 that in respect of T.S. Nos. 7/4 and 7/5 which were above the full tank level, it could be presumed that they never formed part of the tank bed, and consequently they were only ryoti lands. The other lands *viz.*, T.S. Nos. 7/3 and 7/9 ceased to be part of the tank bed on the formation of the railway line in 1916. He, therefore, held that these lands remained validly abandoned as tank bed lands and that they had also become ryoti lands. He held that the landholder was at liberty to admit any ryot into possession without obtaining the permission of the Collector, which would have been necessary under section 20-A of the Madras Estates Land Act, if it formed part of a tank. The Settlement Officer found that the admission by the Zamindar of the plaintiff's father with reference to these lands was valid. As the lands were put to non-agricultural use, it was held that the plaintiff's father would be entitled to a patta under section 18 (4) or under section 19 of the Abolition Act. Section 18 (4) would apply with reference to buildings and section 19 would apply with reference to vacant lands.

4. At that stage the first defendant came forward with a petition to the Director of Settlement praying that the order of the Settlement Officer granting ground rent patta to the plaintiff's father under sections 18 (4) or 19 of the Abolition Act should be set aside. The Director remanded the matter for fresh disposal and this order of remand was confirmed by the Government. This led to a writ petition being filed bearing W.P. No. 2544 of 1968, which came before Kailasam, J. In this order dated 7th January, 1969 the learned Judge pointed out that in the petition filed by the first

defendant he had confined the memorandum of grounds only to T.S. No. 7/5 measuring 22 cents in extent and that the other survey numbers had been struck off. He, therefore, held that the Director was in error in reversing the order of the Settlement Officer dated 7th August, 1965 regarding Survey Nos. 7/3, 7/4 and 7/9. In his order Kailasam, J., observed further as follows:

> "It may also be mentioned that a suit by the petitioner for declaration of his title and possession regarding T.S. Nos. 7/3, 7/4,7/5 and 7/9 is pending and the rights of parties may have to be decided in the civil litigation".

In the result, the order of the Director of Settlement dated 30th September, 1966 was modified and the fresh enquiry directed was to be confined only to T.S. No. 7/5. The order of the Settlement Officer in so far as it related to other numbers was set aside.

5. There was an appeal against this judgment which came before Anantanarayanan, C.J. and Natesan, J., for admission on 17th March, 1969. The learned Judges pointed out that there was a suit for declaration of title pending to which the appellant in the writ appeal *viz.*, the first defendant herein, was a party defendant. They observed as follows:

> "Obviously, the rights between the parties will have to be worked out in the original suit, and, in exercise of our jurisdiction under Article 226 of the Constitution, neither the learned Judge (Kailasam, J.) nor this Bench, in writ appeal, will be concerned with the merits of that pending litigation. Indisputably, the question whether the Settlement Officer should now make a fresh enquiry, only confined to T.S. No. 7/5, or with regard to other survey numbers as well, is independent of the rights which may ultimately be declared in the Common Law remedy, being pursued by the respondent, and, will be subject to that declaration."

The Court did not, therefore, see any need or justification for the admission of the writ appeal. The proceedings before the Settlement Officer stand there even now.

6. The suit, which has given rise to the second appeal, was filed sometime in February, 1966 after the Settlement Officer passed his order on the 7th of August, 1965. I have already mentioned that the prayer in the suit was for declaration of title, for injunction and for possession on the ground that the plaintiffs had become entitled to the properties by purchase and the defendants were disturbing their possession. The suit was defended by the defendants on the ground that the receipts, dated 19th December, 1938, 12th April, 1943 and 23rd July, 1945 could not and did not convey any valid title to the first plaintiff's father, that the proceedings for recovery of possession from Abboy Chetty were not *bona fide* and that the defendants were in actual possession of the properties. Regarding T.S. Nos. 7/4 and 7/9 the case of the defendants was that they originally belonged to one Doraiswamy Pillai and then to Karuppanna Pillai and that from them the first defendant got possession. It was contended that the first defendant, along with his predecessors, was in enjoyment of the said properties for over 25 years.

7. The trial Court framed issues regarding: the title of the plaintiffs to the suit properties, the alleged trespass by the defendant and about the rights of the defendants to get the alternative relief of the possession. It was held that the plaintiffs had proved their title, possession and trespass and the suit was, therefore, decreed.

8. Defendants 1 and 2 to the suit appealed against this judgment. The learned Subordinate Judge held that the suit properties had not been shown to be the subject of the transaction under Exhibits A-25 and A-26 the receipts, dated 12th April, 1943 and 23rd July, 1945 respectively, that they did not evidence the handing over of possession, that patta had not been issued to the plaintiff and that except the " suspicious " delivery of possession in O.S. No. 244 of 1950 no other documentary evidence had been filed to prove possession. The learned Judge pointed out that kist had not been shown to have been paid prior to 1950 with reference to

the properties and that the records on the side of the defendants showed their title and their predecessors' possession from the year 1961. In view of these facts the learned Judge found that the plaintiffs had not proved their title and possession and that the defendants had acquired title by possession for over 12 years. He, therefore, allowed the appeal and dismissed the suit with costs.

9. In the present appeal filed by the plaintiffs, the first submission was that the civil Courts, had no jurisdiction to go into the question as to the character of the lands. According to the learned counsel the lands were ryoti lands, and therefore, the Zamindarini and the Settlement Authorities had exclusive jurisdiction to determine the character of the lands. As in this case the character of the lands has been found to be ryoti lands, the question of issue of patta was exclusively within the domain of statutory authorities, so that the civil Courts would have no jurisdiction to go into them. On behalf of the respondents the submission was that they were not ryoti lands, that the plaintiffs applied for grant of ryotwari patta under section 11 of the Act, that the proceedings in respect thereof had no finality under the provisions of the statute and that the question of title to the property could only be gone into by the civil Courts.

10. In determining the title to properties the civil Courts have jurisdiction to go into all the incidental questions including the character of the lands. In *N. P. Ponnuswami* v. *The Retunirng Officer, Namakkal Constituency, Salem District and athers*[1], the Supreme Court pointed out that where a right or liability was created by a statute which gave a special remedy for enforcing it, the remedy provided by that statute alone must be availed of. The question as to whether the right to obtain ryotwari patta was a common law right or a statutory right was gone into in the *State of Madras represented by the Collector of Ramanathapuram at Madurai* v. *Ramalingaswamigal Madam (North Thiruppachetti) represented by N. S. K. Paramasiva Thevar and others*[1]. The learned Judges pointed out that whenever a claim was made to obtain a ryotwari patta under the provisions of the Act, the civil Court would have no jurisdiction to entertain the same, as the machinery was provided for in the Act for the said purpose. Therefore, it would follow that if in the present proceedings the question was merely one of issue of ryotwari patta, then the civil Court would have no jurisdiction to entertain any suit in respect thereof. But the present suit is for declaration of title and not for a mere issue of patta.

11. But where the question is one of deciding the rival claims to the title, the point to be considered is whether there is any statutory machinery under the Abolition Act, so as to rule out the jurisdiction of Courts. In the *State of Madras* v. *Ramalingaswamigal Madam*[1], after reviewing all the authorities a Bench of this Court pointed out as follows :—

> "There is no machinery in the Act to determine whether a land in an estate is a ryoti land or a communal land .... Even in respect of an enquiry for grant of a ryotwari patta under section 11 read with section 3 (2) of the Act, the decision as to question of title by the statutory authorities is only an incidental matter which would not preclude a civil Court independently enquiring into it in a properly constituted suit."

The learned Judge in dealing with the plea that section 64-C of the Abolition Act excluded the jurisdiction of Courts held that that provision could not be held to be a bar.

12. The same question has been gone into by a Division Bench in the *State of Madras, represented by the District Collector, Ramanathapuram at Madurai* v. *Balamanavala Reddiar and another*[2], and the learned Judges observed as follows :—

> "It is true that by reason of section 11 of the Abolition Act, the plaintiffs in

1. 1952 S.C.J. 100 : 1952 S.C.R. 218: (1952) 1 M.L.J. 775 : A.I.R. 1952 S.C. 64.

1. (1969) 2 M.L.J. 281.
2. (1972) 85 L.W. 141 at 146 : A.I.R. 1973 Mad. 14.

these suits cannot invoke the jurisdiction of the civil Court for obtaining a ryotwari patta, but they are certainly entitled to get a declaration of their title to safeguard their possession of the suit lands ...."

In a later Bench decision reported in *T. M. Lakshminarayana Ayyar and others* v. *Nallachi Ammal and others*[1], it was observed that the question of title has necessarily to be gone into by the civil Court and is not a matter within the jurisdiction of the Settlement Authority. In the same page it was again observed even with reference to a case where patta had been granted as follows :—

"...... we fail to see how it can be rightly contended that the question of title to the land cannot be agitated in the civil Court. Even under the above circumstances, the grant of patta by the Settlement Authority to a particular party may at best be only one piece of evidence regarding the question of title to the land. So it cannot be said that once the settlement authorities grant a patta to one of the rival claimants, the jurisdiction of the civil Court to go into the question of title to the land is taken away."

At page 281, in paragraph 15 it was pointed out that the Act had not provided any machinery to determine a dispute between rival claimants for ryotwari patta under section 11 and that section 11 itself did not provide such machinery. It was also pointed out following the decision in the *State of Madras* v. *Ramalingaswamigal Madam*[2] that the finality under section 64-C was only in respect of matters to be determined for the purpose of the Act and that section 64-C was not a bar to the maintainability of a suit for title.

13. From the cases discussed above it follows that the Act has not provided any machinery for the purpose of deciding a dispute between the rival claimants for ryotwari patta under section 11 and that any decision of the statutory authorities on this aspect has no finality so as to bar the jurisdiction of Courts. The suit herein being for the purpose of getting a declaration of title to the lands, all questions bearing on the point in issue before the Court are open for decision by the Court. There is no provision in the Abolition Act, which has impressed the decision of the statutory authority with any finality for all purposes so as to rule out the decision by the Courts.

1. (1974) 87 L.W. 276 at 280.
2. (1969) 2 M.L.J. 281.

14. The next question that arises is regarding the character of the lands. There is a definition of "Rvoti land" is section 3 (16) of the Madras Estates Land Act, as meaning cultivable land in an estate other than private land but as not including beds and bunds of tanks and of supply, drainage surplus or irrigation channels etc. The word "ryot" has been defined in section 3 (15) of the Act as meaning a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which was legally due upon it. Therefore, in order to be entitled to a patta in respect of a ryoti land, the land must be held for the purpose of agriculture. In the present case it is not in dispute that the land was claimed as an appurtenance to the rice mill owned by the plaintiffs. The plaintiffs would clearly thus be outside the scope of 'ryots', as the land is not held for agricultural purpose. The land was never under cultivations. The land would not be ryoti land. The Estates Land Act is designed to protect agriculturists and not others. *Sri Venugopala Rice Mill* v. *Raja of Pethagoundam*[1].

15. The next question is whether the decision of the Settlement Officer that the land is a ryoti land is binding on civil Courts. For the present purpose I proceed as if the order of the Settlement Officer in Exhibit A-5 still holds the field. A Full Bench of this Court in *Sri Pollapalli Venkatarama Rao and others* v. *Musunuru Venkayya and others*[2] has held that a decision of the Revenue Court incidentally on a particular matter which did not fall within its exclusive jurisdiction would not be binding on the parties in a civil Court. In section 15 of the Abolition Act there is a provision that the claim for ryotwari

1. (1930) I.L.R. 53 Mad. 367 at 374 : 32 L.W. 92 : 128 I.C. 525: 59 M.L.J. 74 : A.I.R. 1931 Mad. 194.
2. (1954) 2 M.L.J. 1 : 67 L.W. 354 : I.L.R. (1954) Mad. 715.

patta under sections 12, 13 and 14 should be examined by the Settlement Officer and decided by him. Against the decision of the Settlement Officer, there is a right of appeal to the Tribunal. Section 15 (2) (*b*) provides that the decision of the Tribunal on any such appeal shall be final and not liable to be questioned in any Court of law. But a similar provision has not been made with reference to the claim for grant of patta under section 11 of the Act. It follows that the statute did not want the matters to be examined under section 11 to be within the exclusive jurisdiction of the statutory authorities. Therefore, any decision in any proceeding under section 11 would not be binding on the civil Court. Similarly any decision under the provision of sections 18 or 19 of the Act with reference to the grant of patta to buildings or vacant lands cannot also have a finality beyond the scope of examination by a civil Court. As pointed out earlier, the finality under section 64-C of the Abolition Act is only for the purpose of the Act and has no effect in a suit for declaration of title. See also the *State of Madras* v. *Balamanavala Reddiar and another*[1], *State of Madras* v. *Ramalingaswamigal Madam*[2] and *T. M. Lakshminarayana Ayyar and others* v. *Nallachi Ammal and others*[3].

16. I have now to examine the title of the plaintiffs to the suit properties. The only evidence in support of the plaintiffs' claim is found in Exhibits A-24, A-25 and A-26. I have already given relevant particulars regarding the receipts, dated 19th December, 1938, 12th April, 1943 and 23rd July, 1945. As regards these receipts the contention on behalf of the respondents was that they could not serve as foundation for establishing title to an immoveable property, as title to immoveable property could only be obtained by a registered sale deed. In support of the above contention my attention was drawn to the decision of the Supreme Court in *Alapati Venkataramiah* v. *Commissioner of Income-tax, Hyderabad*[4]. It was ruled in that case that title to immoveable property could not pass till conveyance was executed and registered. Those receipts cannot, therefore, serve as foundation of title to the suit lands. Further in Exhibits A-24 and A-25 there is a reference to the surrender of these receipts in exchange for a patta. It is not clear as to why the plaintiffs' father did not take any steps for obtaining a patta and surrender these receipts. As the plaintiffs do not have any conveyance in their favour or in favour of their predecessor, there can be no question of the plaintiffs having any title to the suit property. The defendants based their claim on adverse possession. I shall examine their claim presently. But in the absence of a proper conveyance in favour of the plaintiffs or their predecessor, it has to be held that they have not established their title to the suit properties so that they cannot obtain a declaration as prayed for. The specific case set up in the plaint is that there was a sale in their favour or in favour of their predecessor. As there is no registered document conveying the property, the case set up by the plaintiffs on the basis of title has to be rejected and was rightly rejected by the lower appellate Court.

17. The learned counsel for the appellants pointed out that the plaintiffs have paid kist with reference to these properties thereby establishing their title to them. The payment of kists is evidenced by Exhibits A-27 to A-34. All these receipts relate to a period subsequent to 1960. It is not clear as to why, if the plaintiffs were entitled to the suit properties even from 1938 and 1945 onwards, there has been no payment of kist by them at any time till 1960. But the payment of kist is not conclusive as even with reference to the payment of kist it has been held in *Uthamaram Nathuram Sait and others* v. *Hude Gopalakrishnayya*[1], by a Bench of this Court that the fact that the kist was paid did not prove possession when it is also paid by the rival party. In the present case the defendants also claimed to have paid kist and in addition rely on Exhibits B-55 to B-62 which are adangal extracts from fazli 1366 onwards. These go to

1. (1971) 85 L.W. 141 at 148 : A.I.R. 1973 Mad. 14.
2. (1969) 2 M.L.J. 281 at 296.
3. (1974) 87 L.W. 276 and 280.
4. (1965) 2 I.T.J. 164 : 57 I.T.R. 185 : (1965) 2 S.C.J. 283 : (1965) 2 M.L.J. (S.C.) 9 : (1965) 2 An.W.R. (S.C.) 9 : (1965) 3 S.C.R. 567 : A.I.R. 1966 S.C. 115.

1. (1957) M.W.N. 112 : A.I.R. 1957 Mad. 463.

show that the defendants have been in possession of the properties. Therefore, the fact that at some point of time the kist was claimed to have been paid by the plaintiffs does not establish that the plaintiffs have been in possession of the suit properties. If they proved possession over the statutory period, then perhaps the case of the plaintiffs would have deserved further examination. But there is absolutely no evidence of possession, at any rate, after 1952 when the lands were said to have been got delivered in execution proceedings taken against Abboy Chetty. The case of the plaintiffs has, therefore, to fail, as they have not established any title or possession over the statutory period.

18. It was next contended on behalf of the appellants that the present claim of the defendants is barred by *res judicata*. The foundation for this contention is that the question of issue of patta had been considered and decided in favour of the plaintiffs in the settlement proceedings, which have virtually been confirmed by Kailasam, J., as the learned Judge held that the remand made by the Board of Revenue would operate only in respect of T.S. No. 7/5. The point sought to be made is that with reference to other survey numbers the order of the Settlement Officer stood.

19. This contention appears to be opposed to the decision in the *State of Madras* v. *Balamanavala Reddiar and another*[1]. In that case the appeal arose out of a suit against the State of Madras for declaration and injunction holding that the suit lands were ryoti lands and not tank bed lands. It was contended for the State that the finding of the Settlement Officer that the suit lands were tank bed lands was final and could not be questioned in a civil Court and that the previous decision by the High Court in the writ petitions filed by the plaintiffs in that case would operate as *res judicata*. In dealing with this point the learned Judges observed at page 148 that though in principle the previous adjudication might operate as *res judicata* the decision of the Settlement Officer whether a land was a ryoti land or not was an order passed in summary proceedings solely for the purpose of granting ryotwari patta. The limited scope of the writ petition in that case is clear from the observations made in the judgment in the writ petition. It was pointed out at page 149 as follows :—

> "The decision of this Court on the writ petitions filed by the plaintiffs went against them mainly on account of the limited jurisdiction of this Court in the writ proceedings, namely, to see whether there was an error apparent ont he face of the record in the orders of the Settlement Officer in refusing to grant patta to the plaintiffs. The decisions are not based on all the materials which were considered in the subsequent suits filed by the plaintiffs. In fact, there can be no question of *res judicata* so long as the parties have a right to a suit to establish their title which could not be lawfully taken away by summary proceedings under the Abolition Act intended merely to determine the question about the grant of ryotwari patta."

I have already extracted the relevant passages from the judgment of Kailasam, J., and also of the Bench which dealt with the appeal therefrom. They also show the limited character of the proceedings. The observations of the learned Judges are clearly to the effect that the question of title was clearly to be determined in civil proceedings. The right of the civil Court to go into the question of title was specically preserved by the learned Judges who heard the appeal. In fact, it was observed by the learned Chief Justice that the proceedings before the Settlement Officer would be subject to the declaration by the civil Court. In view of the above, I am unable to accept the contention of the learned counsel for the appellants that there was any bar of *res judicata* operating against the defendants with reference to their claim.

20. I have already held that the plaintiffs have not established their title to the suit properties. The claim of the plaintiffs would, therefore, fail even independently of any decision on the question as to whether the defendants have perfected their title to the relevant properties by adverse possession. However, having

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1. (1972) 85 L.W. 141 : A.I.R. 1973 Mad. 14.

heard arguments on this question also, I would briefly deal with it.

21. For the appellants the submission was that the defendants were independent trespassers and that a trespasser could not tack on the previous adverse possession of an earlier trespasser. This question as to how far the adverse possession of one trespasser can be tacked on by the successor has been gone into in several decisions. In *Rajagopala Naidu and others* v. *Ramasubramania Ayyar and others*[1], Varadachariar, J. (as he then was), held as follows :—

> "The doctrine of independent trespassers will come in only when the second man trespasses upon the possession of the first or the first man abandons possession. It is not applied to a case in which on the death of the first man while still in possession the person who thinks he is entitled to succeed him steps in without any interruption."

Thus, a person claiming derivative possession from the earlier trespasser could tack on the period of adverse possession of the earlier trespasser. It was ruled by the Allahabad High Court in *Baijnath and another* v. *Ram Bilas and others*[2] that a trespasser succeeding another under an invalid transfer could tack his possession on to that of the former so as to bar a suit for ejectment brought more than 12 years after the dispossession by the original trespasser. Similarly in *Nomula Narasimha* v. *Vasam Mangamma*[3], Venkatasubba Rao, J., held that a succession of trespassers claiming through one another (*e.g.* as heir, legatee, assignee, or otherwise) could though the possession of each of them had extended to less than 12 years, add and tack the periods of their possession so as to defeat the right of the true owner. In *Gurbinder Singh and another* v. *Lal Singh and another*[4], this question has been finally decided. At page 1556, it was observed as follows :—

> "This is a suit to which Article 144 is attracted and the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit *and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims—but not the adverse possession of independent trespassers.*". (Italics mine).

So, the result is that the defendants are entitled to tack on the period of adverse possession of persons through whom they derived title and they have proved adverse possession over the statutory period. Thus, the appeal fails and it is dismissed. There will be no order as to costs. No leave.

R.S. ——*Appeal dismissed.*

1. (1935) M.W.N. 503 : A.I.R. 1935 Mad. 449.
2. (1924) 80 I.C. 12.
3. (1925) 91 I.C. 556.
4. (1966) 2 M.L.J. (S.C.) 8 : (1966) 2 S.C.J. 157 : (1966) 2 An.W.R. (S.C.) 8 : (1965) 3 S.C.R. 63 : A.I.R. 1965 S.C. 1553.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Sakunthala Ammal and another .. *Appellants**

v.

Pattammal .. *Respondent.*

Deed—Construction—Settlement or will—Recitals to be analysed.

Where a document expressed a desire on the part of the executant to give the property dealt with thereunder in favour of her husband with an undertaking by her that the property would not be encumbered or alienated by her during her lifetime and she would only enjoy the income therefrom and that after the lifetime of the executant possession was to be taken by her husband and enjoyed from generation to generation absolutely, the document is a settlement and not a will. [*Paras.* 7 *and* 18.]

In each case, the recitals of the document have to be carefully analysed to find out its true nature. [*Para.* 17.]

Cases referred to:—

Thakur Ishri Singh v. *Thakur Baldeo Singh*, (1884) I.L.R. 10 Cal. 792 ; *Veerabhadrayya* v. *Seethamma*, (1939) M.W.N. 1073: A.I.R. 1940 Mad. 236.

*S.A. No. 851 of 1972.

15th July, 1975.

Sellayya Pillai v. *Devaraya Pillai*, (1972) 1 M.L.J. 297 : 85 L.W. 152: A.I.R. 1972 Mad. 309 ; *Ignatia Brito* v. *Rego*, (1933) 64 M.L.J. 650 : 37 L.W. 716 : 146 I.C. 46 : A.I.R. 1933 Mad. 492.

Appeal against the decree of the Court of the Subordinate Judge, Tiruppattur, North Arcot in Appeal Suit No. 187 of 1969 preferred against the decree of the Court of the District Munsif of Tiruppattur in Original Suit No. 600 of 1961.

A. K. Shanmughasundaram and *K. Ramachandran*, for Appellant.

T. S. Ramu, for Respondent.

The Court delivered the following

JUDGMENT.—The legal representative of the 2nd defendant is the appellant in the Second Appeal.

2. The short facts are as follows : One Ammani Samanna Goundar had a concubine by name Nachiammal who was the sister of one Gopala Goundar. Samanna Goundar had a son by name Dharmalingam, the husband of the plaintiff and they had three sons, defendants 3, 4 and 5. Gopala Goundar had two sons, the defendants 1 and 2. The suit property is a wet land of an extent of 79½ cents out of 1-59 acres comprised in S.N. 94 in Ambalur village. According to the plaintiff, it belonged to Samanna Goundar and he settled the same on 5th April, 1940 in favour of the plaintiff and the defendants 3 to 5 with a direction to get possession after the lifetime of Nachiammal. The said Nachiammal died about 3 months before the filing of the suit and Gopala Goundar her brother also died and defendants 1 and 2 are in possession. Hence the suit for declaration of joint title of plaintiff and defendants 3 to 5 and also for recovery of possession.

3. In the written statement of the 1st defendant it was contended that he was not a necessary party since it is the 2nd defendant alone who was in possession and enjoyment.

4. The 2nd defendant contested the suit stating that the suit property was purchased by Nachiammal under Exhibit B-1 dated 21st February, 1929 and on 16th April, 1929 she executed under Exhibit A-2 a deed of gift wherein the property was bequeathed in favour of Samanna Goundar. Under Exhibit B-2 dated 26th November, 1942 Nachiammal ignoring the earlier deed sold the property in favour of Gopala Goundar who had settled the same under Exhibit B-3 dated 22nd August, 1949 in favour of the 2nd defendant. By reason of this transaction the 2nd defendant's title would be unimpeachable, and the plaintiff's claim is untenable.

5. The suit was originally decreed by the trial Court and was confirmed in appeal. In S.A. No. 1922 of 1964 when the matter came to this Court, by a Judgment dated 18th November, 1968, the matter was remanded for the limited purpose of deciding as to whether Exhibit A-2 dated 16th April, 1929 was a will or settlement, and the other findings were confirmed. After remand, the matter was taken up by the learned Additional District Munsif, Tiruppattur and he came to the conclusion that Exhibit B-2 was a settlement and not a will. On appeal the learned Subordinate Judge confirmed the findings and hence the present second appeal.

6. The learned counsel for the appellants submitted before me that the findings of the Court below relating to the construction of document Exhibit A-2 are incorrect and in support of the same he relies on *Thakur Ishri Singh* v. *Thakur Baldeo Singh*[1] ; *Veerabhadrayya* v. *Seethamma and others*[2], and *Sellayya Pillai* v. *Devaraya Pillai*[3]. The arguments of the appellants are met by the learned counsel for the respondent stating that no exception could be taken to the findings of the Court below relating to the construction of Exhibit A-2 and what was conferred upon Samanna Goundar was with immediate effect with a residue of life interest in favour of the settlor, *viz.*, Nachiammal.

7. Before I advert to the various decisions cited by the learned counsel for the appellant, it would be useful to extract, Exhibit A-2 in full :—

1. (1884) I.L.R. 10 Cal. 792.
2. (1939) M.W.N. 1073 : A.I.R. 1940 Mad. 236.
3. (1972) 1 M.L.J. 297 : 85 L.W. 152 : A.I.R. 1972 Mad. 309.

ரூபாய் 600-00க்கு தான பத்திரம்: 1929ம் வருஷம் ஏப்பிரல் மாதம் 16வ பதினாறாந் தேதியில் நார்த்தார்காட்டி திருப்பத்தூர் தாலுக்கா, அம்பலூர் கிராமத்தில் இருக்கும் வெள்ளாழர் பயிர் வீராசாமி கவுண்டன் குமாரன் அமானி என்கிற சாமண்ண கவுண்டருக்கு ஷை கிராமத்தில் இருக்கும் ஷை அமானி சாமண்ணி கவுண்டன் பெண் ஜாதி நாசம்மாள் ஆகிய நான் என் மனப்பூர்த்தியில் சம்மதித்து எழுதி வைத்துக் கொடுத்த தான பத்திரம் யாதெனில் எனக்கு நீர் புருஷனாக இருப்பதாலும் உனக்கு அடியில் கண்ட சொத்தை கொடுக்க என் மனப் பூர்த்தியில் ப்ரீதி மேலிட்டு எனக்கு 1929ம் வருஷம் பிப்ரவரி மாதம் 21ல் ஷை அம்பலூர் கிராமம் சின்னசாமி என்கிற ஆண்டி கவுண்டரால் கிறயம் பெத்து என் வசம் இருக்கும் அடியில் கண்ட சொத்தை நான் என் ஜீவ தசை பரியந்தம் அடமானம் போக்யம் பராதீனம் தானம் முதலிய எவ்வித பராதீனமும் செய்யாமல் அதில் வரும் மகசூல் வருமானத்தை அடைந்து வந்து என் ஜீவன அனந்திரம் பிரஸ்த் தாப சொத்தை உம்ம சுவாதீனம் செய்துக்கொள்ள வேண்டியது. பிறகு நீரும் உம்ம புத்திர பௌத்திர வம்ச பாரம்பர்யமாய் தானாதி விக்கிறயங்களுக்கு பாத்தியப்பட்டு சர்வ சுதந்திரத்துடன் சுகமாய் ஆண்டு அனுபவித்துக் கொள்ளவும் என் ஜீவதசைக்கு அந்திரம் என்பேரில் இருக்கும் பட்டாவை நீரே மாற்றிக் கொள்ளவும்.

சொத்தின் விவரம்

நார்த்தார்காட்டி திருப்பத்தூர் தாலுக்கா, வாணியம்பாடி சப் டி அமானி அம்பலூர் கிராமத்தில் கரிச 94 நெ. நன்சி ஏ 1. 59க்கு தீர்வை ரூபாய் 18-14-0. இதில் மேல்புரம் அரை வரிசைக்கு ஏ. 0-79½க்கு தீர்வை ரூபாய் 9-7-0, இதுவும் இதர்க்குண்டான விகிதாசார ஆத்து கால்வாய் தண்ணீர் பாத்தியமும் இதிலிருக்கும் செங்கல் கட்டு துரவு கிணர் 1ல் பூரா பாத்தியமும்தான் என்று என் சம்மதியில் எழுதி வைத்துக் கொடுத்த தான பத்திரம்.

By a reading of this entire document three things emerge :—

(1) the desire on the part of the executant to give the property in favour of her husband ; (2) an undertaking that the property would not be encumbered nor alienated during the lifetime of the executant and that she would enjoy only the income therefrom ; and (3) after the lifetime of the executant possession is to be taken by the legatee and to be enjoyed from generation to generation absolutely.

8. Mr. Gopal Ratnam, learned counsel for the appellant would submit that the fact that the executant was desirous of giving the property itself is suggestive that she did not want to give any immediate interest. The undertaking not to create encumbrance or alienate during the lifetime of the executant is of no consequence and such an undertaking cannot be enforced. The rule of absolute enjoyment including obtaining possession would be applicable only after the lifetime of the executant. All these would clearly go to prove that there was no immediate interest conferred upon the husband Samanna Goundar, notwithstanding Exhibit A-2 being styled as the gift deed (*தானபத்திரம்*). That being the position, it would amount only to a will, and therefore the claim of the plaintiff has to be upheld. The above submission ignores, in my view, the vital clause in Exhibit A-2 whereunder not only the executant undertakes not to create encumbrance nor alienate the property during her lifetime, but it is categorically stated she would merely enjoy only the income from the suit property. This would abundantly go to show that the executant has reserved a life estate in her and that is made clear by the later clause wherein it is said that after the lifetime of the executant, possession was to be taken and to be enjoyed absolutely. So it is not correct to contend that no immediate interest is conferred upon the transferee. That the executant is desirous of giving the property is not conclusive. Moreover, the document itself is styled as gift deed. Of course that by itself cannot conclude the rights either way if the recitals are contrary to the nomenclature. But as seen above, the recitals are consonant with the description of the deed.

9. *Thakur Ishri Singh* v. *Thakur Baldeo Singh*[1], is a case where in the deed runs as follows :

1. (1884) I.L.R. 10 Cal. 792.

"I, Maharaj Singh, am the taluqdar of Kanhmow & C., in the Sitapur District. "Whereas I hold and enjoy possession of my estate situate in the Sitapur District, of which the Government revenue is about Rs. 16,000. I while in the enjoyment of sound health and mind, without reluctance or coercion, assign (tamlik) the said property to my younger brother, Baldeo Singh, subject to the following conditions:

(1) That during my lifetime, I shall hold and enjoy possession of it; and that after my death my aforesaid brother, Baldeo Singh, shall hold and enjoy the same like myself;

(2) That whereas I am childless, should a legitimate and self-begotten child be born to me, it shall become the owner of onehalf of the estate, and Baldeo Singh shall be the owner of the other half;

(3) That after my death, Baldeo Singh shall be bound, like myself, to maintain and take care of my wife. Hence I have written out these few words in the way of a deed of assignment (tamliknama) so that it may witness in future. Dated 28th June, 1871."

10. In holding that this document is a will it was held thus:

"The reasons for considering it to be a will are these: It answers the definition of a will which is contained in section 2 of Act I of 1869. It was registered as a will; and though that may have been done at the instance of the Registrar, it certainly was done with the full knowledge and assent of Maharaj Singh. It provides for contingencies which are not ascertainable or may not be ascertained, until the death of the testator, for instance, the contingency of his having a child, which he had not at the time of the will, and the contingency of his leaving a widow surviving him. It does not purport to give to anybody any possessory or present interest until the death of Maharaj, the donor. And it makes a gift to the children of Maharaj, which, if it be a deed of transfer operating at once, cannot take effect, because no child was in existence; whereas, if it is a will, the gift may perfectly well take effect. All those are very strong indicia of a testamentary character; and the question is whether they are overborne by evidence tending in the opposite direction."

11. But the position here is different. No contingency whatsoever arises. As is clear from the above passage the document does not purport to give any possessory or present interest until the death of Maharaj. Hence, this decision has no application.

12. The next case on which reliance is placed is *Veerabhadrayya* v. *Seethamma*[1]. The operative portion of Exhibit A in that case was to the following effect:

"This and the inam land of the extent of 2 acres 89 cents bearing Survey No. 136 aforesaid in the village of Kovvur and the other jeroyati lands and building relating to this village and the inam lands relating to the other villages shall be enjoyed by me and my wife till our death; and after our death, you shall take possession of the lands, etc., of the above particulars and enjoy the same from son to grandson and so on in succession with powers of alienation such as gift, sale, paying the quit rent, etc., payable to Government. Besides, the debts already contracted on the said lands, I shall not incur any further debts, etc., hereafter".

It was held by Venkataramana Rao, J., "It is clear from the language that the disposition in favour of Chinna Subbamma is to operate only in the future, that is, after the death of Veeravadhanulu and his wife. But it is contended that Veeravadhanulu reserved a life interest in his favour and after his death in favour of his wife and the disposition in favour of Chinna Subbamma is a vested remainder. But there is no direct gift in favour of his wife except a statement that it shall be enjoyed by her till her death. If the expression "shall be enjoyed by me and my wife" were to be taken literally, it might mean that they were intended to take

1. (1939) M.W.N. 1073 : A.I.R. 1940 Mad. 236.

the property together, that is a joint life interest must be said to have been conferred on them both ; but it is not contended that such an interest was conferred ."

13. It may also be of interest to note that the learned judge referred to *Thakur Ishri Singh* v. *Thakur Baldeo Singh*[1], in coming to the conclusion that there was no divestiture of ownership or a transfer of ownership *in praesenti* in favour of any body and the only operative portion of the clause is that relating to Chinna Subbamma which is intended to take effect only after his death and is testamentary in its character. Thus this decision is not of any help to the appellant.

14. *Sellayya Pillai* v. *Devaraya Pillai*[2], is a decision wherein Raghavan, J., laid down the following tests for determining whether the document is a will or settlement:—

"(1) the name by which the document is styled ; (*ii*) the registration of the document ; (*iii*) reservation of life estate in favour of the executant: (*iv*) express words as to when possession passed ; (*v*) user of the present or future tense in the document ; and (*vi*) reservation of the power of revocation."

15. In laying down these tests the learned Judge also referred to the two cases cited above, *viz*., *Thakur Ishri Singh* v. *Thakur Baldeo Singh*[1] and *Veerabhadrayya* v. *Seethamma and others*[3] and applying those tests the learned Judge ultimately came to the conclusion that the document in question was a will. That decision does not in any way support the contention of the appellant.

16. One other judgment that may be usefully referred to in this connection is *Ignatia Brito* v. *Rego*[4], wherein a Division Bench categorically held that even the reservation of a life-estate by the settlement does not render the instrument any the less a settlement. In that case it was further held at page 652:

"In Exhibit I the executant has reserved to himself possession with rights of enjoyment of items 1 and 2 for his maintenance, but he makes it clear that he is retaining no right of ownership in these items as the document recites 'I have by this document established and given you right to items Nos. 1 and 2' and goes on to say that his retention of enjoyment, which is to be along with his wife, is to be 'without in any circumstances incurring debts on their security'. It further sets out that a right to his wife and children in those two items 'has been established by this document' while as to the properties generally it recites 'if the properties covered by the deed of settlement are alienated or debts, etc., incurred on their security, you shall be entitled to get possession of and enjoy them as you please according to the terms of settlement after getting cancelled such alienations and security bonds.' These recitals clearly indicate that the disposition of property was to take effect at once and that it was to be irrevocable'.

17. This decision lends great support to the contention of the learned counsel for the respondent. It is unnecessary for me to multiply the authorities because in each case it is the recitals of the document that have to be carefully analysed to find out the true nature.

18. The result is, I am unable to see any error in the judgment of the Courts below and the second appeal will stand dismissed with costs. No leave.

R.S. —— *Appeal dismissed.*

1. (1884) I.L.R. 10 Cal. 792.
2. (1972) 1 M.L.J. 297 : 85 L.W. 152 : A.I.R. 1972 Mad. 309.
3. (1939) M.W.N. 1073 : A.I.R. 1940 Mad. 236.
4. (1933) 64 M.L.J. 650 : 37 L.W. 716 : 146 I.C. 46 : A.I.R. 1933 Mad. 492.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Neikara Abdul Hye Sahib and others .. *Appellants**

v.

Neikara Majid Sahib .. *Respondent.*

Benami—Relevancy of motive—Treatment of property subsequently, a significant factor.

In deciding whether a purchase is benami, the question of motive is not very much relevant, as such purchases are frequent and common in this country. The subsequent treatment of the property is however a significant factor in the matter. Where the consideration for the purchase is small the fact that the vendees are gosha-ladies would not suggest that they would not have the fund to purchase the properties. [*Para.* 5.]

Appeal against the decree of the Subordinate Judge, Tiruppattur in Appeal Suit No. 30 of 1969, preferred against the decree of the Court of the District Munsif of Tiruppattur in Original Suit No. 408 of 1966.

S.M. Amjad Nainar, for Appellant.

L. Vedapuri, for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 2 to 5, 7 and 8 are the appellants in the above second appeal. O.S. No. 408 of 1966 was filed before the Court of the District Munsif, Tiruppattur, North Arcot, for declaration of the plaintiff's title concerning two items of properties, item 1 covering an extent of 1.59 acres and item 2 covering an extent of 1.28 acres. Under Exhibit A-5 dated 20th November, 1941 the mother of the plaintiff Ayisha Bi came to purchase item 1 from one Abul Salam Sahib for Rs. 100 while item 2 was purchased by the sister of the plaintiff Fathima Bi under Exhibit A-1 dated 22nd November, 1942 for Rs. 58-12. Fathima Bi died in the year 1943. Thereafter the mother, Ayisha Bi executed Exhibit A-1, a usufructuary mortgage deed dated 19th February, 1957 in favour of one Batcha Bi over both these items. Exhibit A-2 was attested by the plaintiff. Under Exhibit A-4 dated 10th September, 1959 Batcha Bi, the usufructuary mortgagee assigned her rights in favour of the wife of the plaintiff, Meharunnisa Bi. Ayisha Bi died later on. Thereafter the first defendant's father and the plaintiff had a muchilika executed on 16th February, 1961 under Exhibit B-1. The release under Exhibit A-3 was also executed by the first defendant in favour of the plaintiff. Contending that Exhibits A-5 and A-7 were benami and that the real owner being the plaintiff, he came forward with the suit.

2. In defence it was contended that the ostensible titleholders *viz.*, Ayisha Bi and Fathima Bi were the real owners and the case of benami set up by the plaintiff was false.

3. The learned District Munsif applying the various tests adumbrated in the rulings relating to benami transactions came to the conclusion that the plaintiff's allegation relating to benami had not been proved and consequently dismissed the suit.

4. Thereupon he preferred A.S. No. 30 of 1969 to the learned Subordinate Judge of Tiruppattur, North Arcot, who reversed the findings of the trial Court and granted a decree in favour of the plaintiff holding that Exhibits A-5 and A-7 are benami. Hence the present second appeal.

5. No doubt, both the Courts have set out various tests on which a case of benami has to be made out. The question of motive is not very much relevant. As pointed out by the Privy Council the case of benami purchase is so frequent and common in India and so motive is not necessary. One significant factor which has been lost sight of by the lower Court is the subsequent treatment of the property. From the above narration of the facts it is clear that as early as 1951 under Exhibit A-2, the mother, treating both the items as her own, would create an usufructuary mortgage in favour of a third party. The rights of the usufructuary mortgagee came to be assigned in favour of the plaintiff's wife. This goes a long way to believe the

* S.A. No. 1006 of 1972. 22nd *July*, 1975.

case of the plaintiff on the question of benami. To cap all the plaintiff had attested Exhibit A-2. No doubt, at that time he might not have had any concern in this property till the execution of muchilika Exhibit B-1 dated 16th February, 1961 and Exhibit A-3 the release deed dated 12th December, 1961. But I am resting my conclusion with regard to the attestation, only to show as to how the property was dealt with. Besides, having regard to the smallness of the consideration *viz*., Rs. 100 and Rs. 58-12 it is incorrect on the part of the lower appellate Court to hold that merely because the vendees were gosha ladies, they would not have the fund to purchase the properties. Even assuming that the plaintiff, who was a contractor and who was under affluent circumstances supplied the fund, he has got to prove that he did not intend to benefit either his mother under Exhibit A-5 or his sister under Exhibit A-7. The proof concerning this aspect of the matter is wholly lacking. Therefore, the conclusion is probable that he did intend to benefit the mother or the sister, as the case may be. Even in such a case no question of benami would arise.

6. For all these reasons, I am unable to agree with the findings of the lower appellate Court and consequently the second appeal will have to be allowed and the decree granted by the lower appellate Court is set aside and the dismissal of the suit as held by the learned trial Munsif will stand. There will be no order as to costs. No leave.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N. S. Ramaswami, J.*

C. Balasundaram .. *Appellant**

v.

The Indian Overseas Bank, Kancheepuram, represented by its Agent at Kancheepuram .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), *section* 4*—Bank—Money borrowed from—Decree passed in favour of Bank—Application by judgment-debtor for scaling down—Amendment of Act by Act VIII of* 1973*—Act not applicable to debts due to Banking Company.*

While Act VIII of 1973 amended section 8 of Act IV of 1938 so as to make the scaling down provision applicable to debts incurred before 1st March, 1972, it also provided that the Act was not applicable to debts due to a banking company. A person cannot say that he would take advantage of the provisions contained in the amending Act but at the same time not be bound by the amended provisions contained in section 4 of the Act IV of 1938. [*Para*. 3.]

Appeal against the order of the Court of the Subordinate Judge, Kancheepuram, 20th February, 1975 and made in I.A. dated No. 321 of 1974 in O.S. No. 35 of 1972.

B. Ramamurthy, for Appellant.

R. Vijayan, for Respondent.

The Court made the following

ORDER.—This appeal is against the dismissal of an application under section 20 of Act IV of 1938.

2. The appellant had borrowed moneys from the Indian Overseas Bank, who is the respondent in this appeal, and he wanted to take advantage of the amendment brought in by Act VIII of 1973 to Act IV of 1938. As the debt had been incurred prior to 1st March, 1972, the

* A.A.O. No. 133 of 1975. 27*th August*, 1975.

appellant wants the decree, which has been passed in favour of Indian Overseas Bank, to be scaled down. Before applying for such scaling down, he applied under section 20 of the Act to stay the execution proceedings. The Court below has held that the appellant is not so entitled to have the execution stayed, as the provisions of the Act are not applicable to debts due to the Bank. The correctness of this view is questioned in this appeal.

3. The contention of the learned counsel for the appellant is that only under Act VIII of 1973, a debt due to a banking company has been exempted from the provisions of Act IV of 1938, that such exemption would be applicable only to debts incurred after the coming into force of the amending Act, *viz*., Act VIII of 1973, and that in the present case, the debt having been incurred very much prior to the coming into force of the said amending Act, the same is not exempt from the provisions of Act IV of 1938. This contention is wholly untenable. But for the amending Act VIII of 1973, there is no question of the appellant having any right to apply for scaling down of the debt. As section 8 of Act IV of 1938 originally stood, a debt can be scaled down only if the same had been incurred prior to 1st October, 1932. Admittedly, the debt in this case had been incurred subsequent to that date. If the appellant is to take advantage of the provisions introduced by the amending Act VIII of 1973, he cannot take one part of the amendment and shut his eyes to the other part of the amendment. While the amending Act amended section 8 so as to make the scaling down provision applicable to debts incurred before 1st March, 1972, it also provided that the Act is not applicable to debts due to a banking company. Section 4 of the parent Act has now been substituted by the amending Act and as per the new section [clause (*h*)], debts due to a banking company are exempt from the provisions of the Act. The section says that nothing in the Act shall affect debts and liabilities of an agriculturist falling under the heads mentioned therein. Clause (*h*) is one of the heads which states that liability to a banking company (apart from a public company, State Bank of India etc.,) is one such liability which is so exempt. That being so, the appellant cannot be heard to say that he would take advantage of the provisions contained in the amending Act but, at the same time, he would not be bound by the amended provisions contained in section 4 of the Act. I am quite clear that the appellant is not entitled to have the decree debt due to Indian Overseas Bank scaled down and therefore, he is also not entitled to get an order of stay of execution under section 20 of the Act. The appeal, is, therefore, dismissed. No costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—*G. Ramanujam, J.*

V. C. Kadirvelu .. *Petitioner**

v.

Sub-Collector, Karur, Tiruchy District .. *Respondent.*

Tamil Nadu Panchayats Act (XXXV of 1958), section 153—Panchayat Union—Notice of intention to move no-confidence motion against chairman—Sub-Collector issuing notice to chairman calling for his reply—Subsequent intimation of withdrawal of their intention by seven members—Chairman filing reply to charges and also pointing out that seven persons had withdrawn—Sub-Collector issuing notice convening meeting for considering no-confidence motion—Whether valid.

Out of 26 members of a Panchayat Union, 19 members signed a notice of intention to move a no-confidence motion against the chairman and presented the same to the Sub-Collector. The Sub-Collector communicated this to the chairman and called for a reply. Subsequently, seven out of the 19 members sent individual letters to the Sub-Collector withdrawing their intention. The chairman, in his reply to the Sub-Collector, pointed out that seven persons had withdrawn their consent and that the notice of motion fell short of requisite number required under section 153 (2) of the Panchayats Act. Ignoring this objection, the Sub-

*W.P. S.R. No. 6069 of 1975 19*th September*, 1975.

Collector issued a notice convening a meeting to consider the no-confidence motion. The chairman challenged this by a writ petition to prohibit the Sub-Collector from holding the meeting. He also contended that a copy of the no-confidence motion had not been communicated to him.

Held, The fact that subsequent to the initiation of proceedings under section 153 (4) of the Act, seven of the members withdrew their consent would not take away the jurisdiction of the Sub-collector in the matter. Once the latter considers the reply of the chairman to the charges levelled against him unconvincing he can proceed to call the meeting for consideration of the no-confidence motion. [*Para.* 4.]

It is the copy of the notice of intention to make the motion which is referred to in section 153 (2) of the Act and which is required to be served on the petitioner. [*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of prohibition prohibiting the respondent from holding the meeting on 25th September, 1975 in pursuance of his notice R.C.No.11510 of 1975, dated 3rd September, 1975.

R. Gandhi, for Petitioner.

The Court made the following

ORDER.—The petitioner is the Chairman of the Thantoni Panchayat Union. The said Panchayat Union consists of 26 members out of which 21 are elected from the Panchayats and 5 are nominated.

2. On 22nd August, 1975, One Karuppanna Gounder, a member of the Panchayat Union, along with another member, presented a notice of intention signed by 19 members, out of the total strength of 26 proposing to move a no-confidence motion against the petitioner under section 153(2) of the Tamil Nadu Panchayats Act, 1958. The said notice also contained various charges against the petitioner in respect of which the no-confidence motion was intended to be moved. Later, on 24th August, 1975, the respondent, before whom a notice of intention to move the motion of no-confidence was presented, had communicated the said statement of charges along with the motion signed by 19 members, to the petitioner calling for his reply to the said charges within a week from the date of the receipt of his letter dated 24th August, 1975. It has been alleged by the petitioner that on 26th August, 1975 subsequent to the issue of the notice to the petitioner by the respondent seven of the members have sent individual letters to the Sub-Collector withdrawing their intention to move the no-confidence motion, presented earlier. In his answer to the notice issued by the respondent on 24th August, 1975, the petitioner submitted his explanation to the various charges. In that explanation, he naturally pointed out that seven of the members had withdrawn their consent to the no-confidence motion and, therefore, the signatories to the notice of motion falls short of the requisite number required under section 153 (2) of the Act. Ignoring this objection, the respondent has issued a notice dated 3rd September, 1975 under section 153 (4) of the Panchayats Act convening a meeting on 25th September, 1975 for consideration of the no-confidence motion. It is at this stage the petitioner has come to this Court seeking a writ of prohibition prohibiting the respondent from holding the meeting on 25th September, 1975 as notified.

3. The learned counsel for the petitioner contends that the respondent is in error in overlooking that fact that 7 of the members, who have signed the notice of intention to make the no-confidence motion, have sent letters withdrawing their intention to move the motion that if that fact has been taken into account, the notice of intention to move the no-confidence motion presented before the respondent earlier on 22nd August, 1975 will not satisfy the requirements contemplated by section 153 (2) of the Act, and that the respondent has no jurisdiction to convene any meeting for the consideration of the no-confidence motion against the petitioner. It is also contended by the learned counsel that under section 153 (3) of the Act, a copy

of the actual motion of no-confidence should be communicated to him which has not been done in this case that there is a violation of the procedure contemplated under section 153 (3) of the Act in this case and that therefore, the convening of the proposed meeting for consideration of the no-confidence motion cannot be taken to be valid.

4. I am not inclined to agree with either of these contentions. Firstly, it is seen that the respondent has acted upon the notice of intention signed by 19 members of the Panchayat Union and presented before him under section 153 (2) of the Act by issuing a notice to the petitioner on 24th August, 1975 and calling for his reply to the said charges. From the fact that 7 members who were signatories to the notice of intention presented earlier, had withdrawn their consent, the action earlier initiated under section 153 (3) of the Act on 24th August, 1975 by the respondent will not become invalid. Once the petitioner has been called upon to explain the charges levelled against him in the statement of charges, he has to send a reply to the said charges and if the respondent considers that the petitioner's reply to the statement of charges is not convincing, he can proceed to convene the meeting for consideration of the no-confidence motion. The fact that subsequent to the initiation of the proceedings under section 153 (3) of the Act, seven of the members have withdrawn their consent, will not take away the jurisdiction of the respondent which he has chosen to exercise properly on the presentation of a notice of motion under section 153 (2) of the Act by the requisite number of members. As regards the second contention that the procedure contemplated in section 153 (3) of the Act has not been followed, I find from the copy of the notice dated 24th August, 1975 served on the petitioner that a statement of charges along with the motion has been sent to him. According to the learned counsel for the petitioner, it is not enough to merely serve a copy of the statement of charges along with the notice of intention to make the motion. But it is necessary, under the said section to serve on the petitioner the actual no-confidence motion to be moved. I do not understand the section in the manner suggested by the learned counsel. It is the copy of the notice of intention to make the motion which is referred to in section 153 (2) of the Act and which is required to be served on the petitioner. That has been done in this case. The respondent's notice dated 24th August, 1975 calling for the petitioner's explanation produced before me contains an enclosure which is in two parts, the first part containing a notice of intention to make the motion and the other containing the statement of charges levelled against the petitioner. I do not think that apart from the copy of the notice of intention moved by the requisite number of members under section 153 (2) of the Act, the actual no-confidence motion to be moved at the meeting is required to be served on the petitioner. Both the contentions, therefore, fail. The writ petition is, therefore, dismissed.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*G. Ramanujam, J.*

The All India State Bank of India Supervisory Staff Federation represented by its General Secretary, R. N. Gobele, State Bank of India Buildings, North Beach Road, Madras-1 and another .. *Petitioners**

v.

State Bank of India by its Chairman Central Board of Directors, Madam Cross Road, Bombay-1 .. *Respondent.*

State Bank of India Act (XXII of 1955)*, section* 43*—State Bank—Supervising Staff—Draft rules framed—Not approved by Central Board of Directors—Writ petition by Federation to enforce the rules incompetent—Constitution of India* (1950), *Article* 226.

To govern the service conditions of the supervising staff, the Federation of the State Bank of India Supervisory Staff

* W.P.No. 6136 of 1975.

25th September, 1975.

negotiated with the management and as a result the management framed a set of draft rules. However, these rules were not approved by the Central Board of Directors as required. The Federation filed a petition for the issue of a writ of *mandamus*.

Held: Where the relief sought amounts virtually to seeking specific enforcement of draft rules said to have been framed as a result of an agreement between the petitioner and the management, it is virtually asking for the specific performance of an agreement. It is not possible for the High Court to enforce the so-called agreement which resulted in the framing of the draft rules.

[*Para.* 5.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Respondent herein to implement forthwith the draft rules 29 to 54, Chapter VI of the Service Rules agreed to between the parties or apply forthwith the provisions of paragraph 521 of the Sastri Award to the petitioners.

U. N. R. Rao, M. Gopinathan and *V. Selvaraj* for Petitioners.

The Court made the following

ORDER.—This writ petition has been filed by the All India State Bank of India Supervisory staff Federation for the issue of a writ of *manadamus* directing the State Bank of India to implement fortwith certain draft rules which are said to have been agreed to between the petitioner Federation and the State Bank of India.

2. According to the petitioner the staff of the State Bank of India had been classified into two classes: (1) officers—supervising staff; and (2) the rest popularly known as award staff. While the former category is generally governed by their individual contract of service with the Bank, the working conditions of the latter category are governed by the the Sastri Award, Desai Award and subsequent agreements arrived at between the management of the State Bank and the award staff.

3. To govern the service conditions of the former category, certain rules had been framed by the State Bank of India in the year 1955 in pursuance of section 43 of the State Bank of India Act, 1955, hereinafter called the Act. Chapter VI therein contains rules 32 to 52 dealing with conduct of disciplinary proceedings. According to the petitioner the rules in Chapter VI of the said rules are not as elaborate as the provisions contained in the Sastri Award, Desai Award and other subsequent agreements applicable to the award staff in the matter of disciplinary enquiries. It appears that the petitioner Federation has been clamouring for revision of Chapter VI of the State Bank of India (Officers and Assistants) Service Rules, hereinafter referred to as the rules, framed under section 43 of the Act so as to bring it in line with the Sastri Award, Desai Award and other agreements applicable to the award staff in the matter of disciplinary enquiry. It has also been stated by the petitioner that the said Chapter VI of the Service Rules is not also in conformity with the rules pertaining to Government servants framed under Article 311 of the Constitution of India while the corresponding rules of all Nationalised Banks are in conformity with such rules framed under Article 311. The Federation is therefore said to have started negotiating with the management of the State Bank of India and as a result of the said negotiation the management of the State Bank had framed a new set of draft rules to replace Chapter VI, incorporating most of the suggestions of the petitioner Federation in or about the beginning of July, 1971. But somehow, the draft rules have not been approved by the Central Board of Directors as required. The petitioner has, therefore, approached this Court for the issue of a writ of *mandamus* directing the State Bank of India to implement forth with the said draft rules or to apply forthwith the provisions of Paragraph 521 of the Sastri Award above referred to the members of the Federation who belonged to the former of the two categories of staff set out above.

4. In my view, the petitioner Federation has misconceived its remedy. Admittedly the Sastri Award relating to the second category cannot automatically be applied

to the former category. As it is, there is a set of rules dealing with disciplinary matters, which are applicable to the members of the Federation who belong to the former category. It is true, the petitioner has been agitating for the revision of those rules to bring them in line with the relevant provisions of the Sastri Award or the rules framed under Article 311 of the Constitution in relation to Government servants. It is not for this Court at this stage to pronounce generally, by a declaration as if it were, on the inadequacy of the existing rules or on the necessity for an elaborate set of rules relating to disciplinary proceedings so far as the members of the petitioner Federation are concerned. The petitioner's main contention is that the rules in Chapter VI of the said Service Rules are quite insufficient to stand the test as to the requirement of the rules of natural justice and that, therefore, those rules should be varied or modified so as to be in accord with the elaborate rules set out in the Sastri Award or those framed under Article 311 in relation to Government servants.

5. The rule-making power conferred under section 43 of the Act is vested in a particular authority and this Court cannot undertake the function of framing the rules contemplated under section 43 or to direct that authority to frame a particular set of rules. If the rules as framed under section 43 by the State Bank of India are found to be inadequate in a particular case and in a particular situation, the affected party can always come to this Court on the ground that the rules are unreasonable or unrealistic or that the principles of natural justice have been violated in his case and the Court will not hesitate to grant relief if that ground is established. The mere possibility of the rules being inadequate in a particular situation will not enable the Court to invalidate the same or to suggest that the rules have to be modified in a particular manner. What in effect the petitioner wants in this case is to specifically enforce the draft rules said to have been framed as a result of an agreement between the management and the Federation. It is virtually seeking specific performance from this Court of an agreement, it is said to have entered into with the management. I am of the view that it is not possible for this Court to enforce the so-called agreement which resulted in the framing of the draft rules. But this order of mine should not be understood as approving the validity of the said rules or to mean that any order passed by the respondent in a disciplinary proceeding relating to the members of the former category following the procedure contained in Chapter VI of the said rules cannot be challenged before this Court on the ground that it has violated the basic principles of natural justice.

6. With these observations, the writ petition is dismissed.

S.J. — *Writ petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam, J.*

V. S. Ahmed Thambi Maraicayar ..*Petitioner**

v.

M/s. Revathi Stores by its Partners *Respondents*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (a) (*i*) *and* 3 (c)—*Tenant occupying residential and non-residential portions—Landlord seeking to evict on ground of need for additional accommodation—Single application—If maintainable.*

The plea, that an application by a landlord for eviction of the tenant on the ground of requirement of additional accommodation for himself of both residential and non-residential buildings is not maintainable, is not tenable. If a landlord is occupying a part of a building, whether it is residential or non-residential or whether he wants additional accommodation for residential or business purposes, he may apply under section 10 (3) (*a*) of Act XVIII of 1960. The wording is wide enough to enable the landlord to apply if he wants additional accommodation either for one of the purposes or both the purposes, residential or non-residential. [*Para.* 3]

* C.R.P. No. 1381 of 1974.

25*th September*, 1975.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control Act (XVIII of 1960) as amended by Act (XXIII of 1973) praying the High Court to revise the order of the Court of the Small Causes (III Judge Appellate Authority) Madras, dated 28th March, 1974 and made in H.R.A.No. 93 of 1973 (H.R.C. No. 354 of 1971) Court of Small Causes (VIII Judge, Madras).

G. Ramaswami and *M.A. Sadanand,* for Petitioner.

K. Shanmugam and *M.G. Natarajan,* for Respondents.

The Court delivered the following

JUDGMENT:—The tenant is the petitioner. The landlord sought to evict him on the ground that he required the premises for his own use and occupation. The building was purchased by the landlord in 1970 while the tenant is in possession of the premises from 21st October, 1959. After the landlord purchased the building in 1970 he filed two petitions for eviction of the tenant one under section 10 (3) (*c*) and another under 10 (3) (*a*) (*i*) the first relating to non-residential portion and the second to residential portion. The Courts below found that the landlord had made out a case and ordered eviction. In this revision petition on behalf of the tenant, it is submitted that the landlord is not competent to maintain this application as the landlord which is a partnership firm is no longer in existence as one of the partners is dead. Secondly, it was contended that two portions are occupied by the tenant, one for non-residential purposes and another for residential purposes and one application covering both the residential and non-residential purposes is not maintainable. Lastly, he submitted that in fact the premises is not one building but two buildings and therefore the landlord cannot ask for additional accommodation.

2. Regarding the contention that the landlord which is a partnership is no longer in existence, there is hardly any material to support that contention. The defence is that one of the partners died and in his place his legal representatives have been taken. There is hardly any material to substantiate the contention of the tenant that the partnership is no longer in existence. It is also not disputed that the rent has been paid and received by one of the partners.

3. The plea that an application for eviction on the ground of requirement of additional accommodation of both residential and non-residential buildings is not maintainable cannot also be accepted, for the wording of section 10 (3) (*c*) is wide enough. For it states, "A landlord who is occupying only a part of a building, whether residential and non-residential, may, notwithstanding anything contained in clause (*a*) which relates to eviction in the case of residential and non-residential buildings apply to the Controller for an order directing any tenant occupying the whole of any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for purposes of a business which he is carrying on, as the case may be". This right is available to the landlord in addition to what is provided for in section 10 (3) (*a*). If the landlord is occupying a part of the building, whether it is residential or non-residential or whether he wants additional accommodation for residential or for a business purpose, he may apply. The wording is wide enough to enable the landlord to apply if he wants additionl accommodation either for one of the purposes or for both the purposes, residential or non-residential. I do not see there is any substance in this contention.

4. Lastly it was contended that the building bears two separate numbers and as such is not one building. This plea was not taken in any of the Courts below and at this late stage the petitioner cannot be allowed to raise it. In the result, all the contentions raised by the tenant fail and this petition is dismissed. There will be no order as to costs. Time for vacating the premises is six months from this date.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N.S. Ramasawmi, J.*

N. K. S. Rajarathinam Chettiar .. *Appellant**

v.

The Regional Director, Employees State Insurance Corporation, Madras represented by Local Manager B-9, Subramania Nagar, Salem .. *Respondent.*

Employees' State Insurance Act (XXXIV of 1948), section 2 (12)—Flour mill—Twenty persons working including proprietor—Proprietor not working for wages—Premises not a factory.

On three days of inspection, of a flour mill it was found that there were 14 workmen and 5 clerks in the mill. Including the proprietor, there were 20 persons working. The question was whether the flour mill was in the circumstances a factory for purposes of the Employees' State Insurance Act.

Held, as the employer was not shown to be receiving any wages on any day during the relevant period, he was certainly not to be counted in order to determine whether the premises was a factory or not. If the employer was left out from counting, then, only nineteen persons were found working on the relevant dates and therefore the premises would not come under the definition of the word "factory". [*Para.* 5.]

Case referred to :—

Sehgal Industrial Works v. *E.S.I. Corporation, Delhi*, (1974) 46 F.J.R. 417.

Appeals against the order of the Employees Insurance Court, Salem dated 10th November, 1974 and made in E.I.A. No. 1 of 1970 respectively.

V. S. Ramakrishnan, for Appellant.

M. Ali Mohamed, Junior Central Government Standing Counsel, for Respondent.

* A.A.O. Nos. 301 and 302 of 1975.

3rd November, 1975.

The Court made the following

ORDER.—These two appeals are against the order of the Employees Insurance Court (District Judge, Salem) dismissing two applications filed by the proprietor of a flour mill in which he prayed that the claim made by the Regional Director of Employees State Insurance Corporation should be cancelled. There were two claims by the Corporation, one for employees' contribution and the other for employers' contribution. The proprietor of the flour mill contended that his mill is not a factory as defined under the Employees' State Insurance Act, 1948, hereinafter referred to as the "Act" and that therefore the claims made by the Regional Director of the Employees State Insurance Corporation are not valid. The Employees Insurance Court did not accept the contention of the petitioner before it, and hence, the two appeals by him.

2. The admitted fact is that during the relevant period, there were 14 workmen and 5 clerks working in the flour mill. The Inspector of the Corporation had visited the premises on 4th October, 1967, 7th February, 1968 and 23rd March, 1968 and he has submitted his survey report as per Exhibit B-1 dated 5th April, 1968. On the three days, he so visited the premises, admittedly 14 workmen and 5 clerks were working there. It is also not disputed that they are all persons who were working for wages. In addition to them, the petitioner (appellant before me) as the proprietor of the concern was also found in the premises. It may be taken for the present purpose that he was found working in the mill on those days. If the proprietor is also to be counted as one of the persons contemplated under section 2 (12) of the Act, then undoubtedly 20 persons were working on the relevant dates. It is not disputed that under such circumstances the flour mill would be a factory as defined under section 2 (12) of the Act. However, the contention on behalf of the petitioner appellant is that he, as the proprietor, is not a person as contemplated under section 2 (12) of the Act as it is nobody's case that he is receiving wages.

3. In the Court below the petitioner had put forward a case that after 2nd June, 1967 he ceased to go to the mill premises

because of illness, that only his clerks had been managing the affairs of the mill and that therefore, in any event, he cannot be included as one of the persons working in the premises during the relevant period. It was claimed that on 2nd June, 1967, the petitioner had written to the Inspector of Factories, Salem within whose jurisdiction the flour mill is situated, that he ceased to be the manager of the mill and that only his clerks were actually managing the mill. The petitioner also produced the personnel register in order to show that from 3rd June, 1967 onwards he had not been visiting the mill. This fact of the petitioner's case has been rejected by the Court below and I should say quite rightly. Even, subsequent to the date of the alleged communication in which the petitioner had stated that he ceased to manage the mill the had submitted Exhibit B-2 dated 16th October, 1967 in Form No. 2 to the Inspector of Factories, wherein he has described himself as the occupier of the premises as well as the manager thereof. Under such circusmtances, it is not contended before me on behalf of the petition er-appellant that as proprietor he was not managing the mill during the relevant period. The evidene of R.W. 1, the then Inspector of the Corporation who had visited the mill on the three dates mentioned above, that on those dates he found the petitioner, who is the proprietor, was working in the mill managing its affairs, is not now disputed. Therefore, I have to proceed on the footing that on the relevant dates, apart from 14 workmen and 5 clerks, the proprietor was also working in the mill.

4. In the Court below the petitioner had contended that even the clerks are not to be counted for finding our whether the premises is a factory or not. That contention has been rejected and such a contention is not raised before me. Therefore, the only question is whether the proprietor is also a person coming under the definition contained in section 2 (12) of the Act.

5. The definition of the word "factory" as amended by Act XLIV of 1966 says that a "factory" means any premises including the precincts thereof whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, etc. Prior to the abovesaid amendment, in the place of the words "are employed or were employed for wages", the words "are working or were working" were found. As the definition originally stood prior to the amendment, if in any premises where twenty or more persons are working or were working, whether it is for wages or not, on any day of the preceding twelve months, it would be a factory provided that in any part of the premises a manufacturing process is being carried on with the aid of power etc. But under the definition as it stands after the amendment, the mere fact that twenty or more persons are working or were working on any day of the preceding twelve months, would not be sufficient for making it a factory. The persons working should be so working for wages, the word "wages" being defined under section 2 (22) of the Act. Unless a person receives wages for his work, he is not one to be taken into consideration in order to determine whether the premises is a factory or not. In the present case, as the employer is not shown to be receiving any wages on any day during the relevant period, he is certainly not to be counted in order to determine whether the premises is a factory or not. The other requirements of the definition of the word "factory" might be satisfied in this case. But, however, if the employer is left out from counting, then, only nineteen persons were found working on the relevant dates, and therefore the premises would not come under the definition of the word "factory".

6. The learned counsel appearing for the respondent referred to certain decisions rendered regarding the definition of the word "factory"; but they have no bearing at all to the present case because those decisions had been rendered when the definition of the word "factory" had not been amended by Act XLIV of 1966.

7. Then the learned counsel for the respondent contends that the legislation being a social welfare legislation, wide interpretation should be given in respect of the words "are employed or were employed for wages" now occurring in the definition of the word "factory" in section 2 (12) of the Act, and it must be held that

the petitioner-appellant should also be counted for making up the total of twenty persons in order to bring the premises under the definition. He also referred to the objects and reasons for bringing in the amending Act XLIV of 1966. But that does not in any way help him. As a matter of fact, as far as the amendment relating to the word "factory" under section 2 (12) of the Act is concerned, it is clear that the amendment was only to clarify certain terms and expressions. Whatever that be, when the definition as it now stands says "twenty or more persons are employed or were employed for wages", one cannot possibly take in a person even though he be working in the premises if he has not received any wages therefor I have already pointed out that it is nobody's case that the petitioner-appellant who is the proprietor of the flour mill is receiving wages.

8. The learned counsel ultimately contended that the clause "are employed or were employed for wages" is a disjunctive clause and that therefore the words "for wages" should qualify only the persons who "were employed" and not the persons who "are employed". I am afraid that such an interpretation is wholly uncalled for. A plain meaning of the clause is that any person who is employed in the premises either on the day when the inspection is made or was employed earlier within the preceding twelve months, should be so employed for wages, in order to count for inclusion in the definition. It is significant to note that there is not even a "comma" after the words "are employed" occurring in the definition as it now stands. I am unable to see how the words "for wages" can be said to qualify only the words "were employed" and not the words "are employed".

9. Of course, the word "employed" does not by itself mean that the person would be engaged in any particular work for remuneration or wages. The word "employed" may mean merely working or engaged in work. But the definition as it now stands does not stop with the use of the word "employed" either in the present or in the past. The person must be employed for wages, in order to bring him within the definition of the word "factory". In *Sehgal Industrial Works v. E.S.I Corporation, Delhi*[1], the Delhi High Court has taken a similar view as mine with regard to the amended definition of the word "factory".

10. The appeals are therefore allowed. But in the circumstances, there would be no order as to costs.

S.J. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*V. Ramaswami, J.*

D. Padmanabhan .. *Petitioner**

v.

The State of Tamil Nadu represented by The Secretary to Government, Public Works Department, Fort St. George, Madras-9 .. *Respondent.*

Industrial Disputes Act (XIV of 1947), section 2 (j)—Public Works Department of Government—Whether industry—Held not an industry.

Among the Employees of the Public Works Department is a section designated as Work Charged Employees of Work Charged Establishment. Its members are employed on the actual execution of a specific work or sub-work of a specific project or upon the supervision of departmental labour etc., in connection with such work. Their pay and allowances are met from the estimated amount of the concerned work. They are not rated as casual labourers and even when there was no immediate work they are kept on the pay rolls and paid on monthly basis on time-scales of pay. But they were not governed by any statutory rules. The petitioner who was a member of the Establishment sought a declaration that the P.W.D. was an "industry" and that the Work Charged Employees were "workmen" as defined under the Industrial Disputes Act.

Held, the Public Works Department was not an industry in respect of its activities relating to construction of Government

1. (1974) 46 F.J.R. 417.
*W.P. Nos. 2807 and 2808 of 1972.
14th November, 1975.

buildings, such as hospitals, colleges, schools and Court buildings. [*Para.* 20.]

The memebers of the Work Charged Establishment are Government servants and the Government, as an employer was entitled to regulate their conditions of service. [*Para.* 21.]

Cases referred to:—

Safderjung Hospital v. *K.S. Sethi*, (1971) 1 S.C.R. 177: (1970) 2 S.C.J. 755: A.I.R. 1970 S.C. 1407; *State of Bombay* v. *Hospital Mazdoor Sabha*, (1960) 1 L.L.J. 251: 1960 2 S.C.R. 866: 1960 S.C.J. 679: A.I.R. 1960 S.C. 610; *The Secretary of G.C.E. Union* v. *Management of G.C.*, (1968) 1 S.C.R. 742: (1968) 2 S.C.J. 138: (1968) 2 An.W.R. (S.C.) 6: (1968) Lab. I.C. 547: A.I.R. 1968 S.C. 554; *Federated Municipal and Shire Council Employees of Australia* v. *Melbourne Corporation*, 26 C.T.R. 508; *Federation of Indian Chamber of Commerce and Industry* v. *R.K. Mittal*, (1972) 2 S.C.J. 61: (1972) 2 S.C.R. 353: A.I.R. 1972 S.C. 763; *Corporation of City of Nagpur* v. *Its Employees*, (1960) 1 L.L.J. 523: (1960) 2 S.C.R. 942: (1961) 2 S.C.J. 134: A.I.R. 1960 S.C. 675.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to: (*i*) issue a writ of *certiorari* calling for the records from the respondent (The State of Tamil Nadu, represented by The Secretary to Government, P.W. Department, Madras-9,) and quash G.O. Ms. No. 1904 (P.W.D.), dated 10th September, 1971 (Exhibit "A") so far as it relates to the Petitioner; (*ii*) to issue a writ of declaration declaring the petitioner as a "workman" falling within the definition under section 2 (*s*) of the Industrial Disputes Act, 1947 in W.Ps. Nos. 2807 and 2808 of 1975 respectively; (*iii*) to award costs of both the petitions.

A. Ramachandran, for Petitioner.

S. Ramalingam, Assistant Government Pleader, for Respondent.

The Court made the following

ORDER.—Among the employees of the Public Works Department of the Government of Tamil Nadu, is a section designated as Work Charged Employees of "Work Charged Establishment". The members of the Work Charged Establishment are employed upon the actual execution of a specific work, or sub-work of a specific project, or upon the supervision of departmental labour, stores and machineries, in connection with such a work or sub-work. Their pay and allowances are paid from the estimate amount of the concerned work. As such, the members are classified under Work Charged Establishment, and they are governed by the Tamil Nadu Public Works Department Code.

2. The employees recruited by the Department were originally intended for the duration of the particular work, but in practice, except in very rare instances, the work charged employees on completion of the specified project or work were employed in another work without any break. These members of the Work Charged Establishment were paid monthly pay and allowances and not rated as casual labourers. Even when there was no immediate work, they are kept on the pay rolls and paid on monthly basis on time-scales of pay. But, these persons were not governed by any statutory rules. They were governed by the provisions in paragraphs 58 to 62 of the Public Works Department Code.

3. The position of these employees was reviewed by the Government time and again. By G.O.Ms. No. 95, P.W. D., dated 9th January, 1971, the Government directed that the members of the establishment who have been in service for over five years, as on 24th November, 1970, should be provincialised with effect from the said date. These provincialised work charged employees were also made eligible for time-scales of pay, leave, joining time, contributory provident fund benefit in lieu of gratuity, house-rent allowance and other benefits, privileges and concessions, which are available to the members of the regular establishment. Members who were under the non-provincialised work charged establishment are entitled to gratuity at the time of their retirement, instead of contributory provident fund.

4. In G.O.Ms. No. 142, P.W.D., dated 3rd February, 1973, time-scales of pay, for as many as 137 categories of work charged

establishment were sanctioned by the Government. By G.O.Ms. No. 1904, P.W.D. dated 10th September, 1971, the Government applied the provisions of the Tamil Nadu Government Servants Conduct Rules to the members of the Work Charged Establishment (provincialised and non-provincialised) and also prescribed the procedure to be followed before imposing penalty on the members of the Work Charged Establishment.

5. The Tamil Nadu Public Works Department Employees Association, a registered Trade Union, whose membership was open only to Work Charged personnel of the Public Works Department, both provincialised and non-provincialised, in their petition dated 3rd February, 1972, questioned the legality of the application of the Government Servants Conduct Rules and certain provisions of the Civil Services (Classification, Control and Appeals) Rules to the members of the Work Charged Establishment. In this petition, they also contended that the members of the Work Charged Establishment are "workmen" as defined in the Industrial Disputes Act, 1947, and that the Work Charged Establishment is an industry, as defined in the same Act. They accordingly prayed for a declaration that the members of the Work Charged Establishment are not Government Servants, but only workmen, as defined by the Industrial Disputes Act. Pending final decision, they also requested the Government to stay, with retrospective effect, the operation of G.O.Ms. No. 1904 P.W.D., dated 10th September, 1971.

6. They also filed a petition before the Commissioner of Labour on 21st August, 1972, alleging an industrial dispute and requesting him to take the dispute on his file, initiate conciliation proceedings and help in solving the dispute amicably. Since the Commissioner had not taken any steps, the petitioner who is also the General Secretary of the Tamil Nadu Public Works Department Employees Association, has filed these two writ petitions in his individual capacity. In one of the Writ Petitions, he had prayed for a declaration that he is a workman falling within the definition of section 2 (*s*) of the Industrial Disputes Act and in the other, prayed for the issue of a writ of *certiorari* to quash the Government Order in G.O.Ms. No. 1904, P.W.D. dated 10th September, 1971.

7. In his affidavit dated 1st September, 1975, the petitioner has stated that he joined the Public Works Department, in 1961 as maistry and was asked to work in the construction of the Government General Hospital, Madras, as maistry. He was working in that place upto 1965 and thereafter he was transferred as a maistry to work in the construction of the M.L.A.'s hostel. After working there for two years, in 1967 he was transferred as maistry to work in the construction of the Pediatrics Blocks in Halls Road, Egmore. Thereafter he was working in the construction of the Neurological Block, Government General Hospital till 1971. After working for sometime again in the Pediatrics Department, he was transferred to the construction work of the Law College Hostel in 1974. His designation as maistry was changed into one of Works Inspector in 1971. He was transferred to work in the construction of the extension to the City Civil Court Buildings, Madras in 1975. His services were provincialised on 24th November, 1970, as per G.O, Ms. No. 95, P.W.D., dated 9th January, 1972. It is seen from the Service Register of the petitioner that right from his employment in 1961, he was paid a monthly salary with yearly increments and he was never rated as a casual labourer.

8. On these facts, the petitioner contended that the petitioner and these persons, who were employed as Work Charged Employees are not civil servants, and, therefore, the Fundamental Rules and Civil Service Rules should not be applied to him. The petitioner also contended. "The Public Works Department is an undertaking, which by its activity coupled with the work done by the Work Charged Employees brings about the production of material services. Thus it systematically undertakes the construction of roads and buildings, etc., which are put to public use. Therefore.......the Public Works Department in employing the Work Charged Establishment is carrying on an industry." The petitioner further stated that the work charged employees fall within the definition of "workmen" under the Industrial Disputes Act,

9. The respondent, on the other hand contended that the execution of public works, such as construction of Government buildings, hospitals, schools and colleges, irrigation works, etc., is not a commercial activity, but is in furtherance of Government functions for the welfare of the general public. It is also a sovereign function enjoined on the State Government to carry out and look after such public works and the Public Works Department is only a delegated authority of the Government of such works. Therefore, the Public Works Department is not carrying on an undertaking and is not an industry within the meaning of the Industrial Disputes Act, 1947. The employees of the Work Charged Establishment are Government Servants and they are not workmen within the purview of the Industrial Disputes Act.

10. At the time of the argument, the learned counsel for the petitioner also submitted that even if he is a Civil Servant within the meaning of Article 309 of the Constitution, he should still be treated as a workman and the Public Works Department in so far as they carry out the special works should be treated as an industry within the meaning of the Industrial Disputes Act.

11. As the Government themselves are contending that the Work Charged Establishment employees are Civil Servants within the meaning of Article 309 of the Constitution, it is not necessary for me to go into that question in these writ petitions. Therefore, the only question that remains for consideration is whether the Public Works Department in respect of their execution of public works, such as the construction of Government buildings, hospitals, colleges, schools, office buildings, irrigation works, etc., can be said to carry on any business, trade, undertaking, manufacture or calling, which brings them within the definition of 'industry' in section 2 (*j*) of the Industrial Disputes Act.

12. 'Industry' is defined in section 2 (*j*) which reads as follows:

"'Industry' means any business, trade, undertaking, manufacture or calling of employers, and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen".

A number of cases of the Supreme Court have dealt with the meaning of this expression. It is not necessary to consider all of them, except the decision in *Safderjung Hospital* v. *K.S. Sethi*[1] and the decision in *The Workmen of Indian Standards Institution* v. *The Management of the Indian Standards Institution.*[2]

13. The conclusion of the decision in *Safdarjung Hospital* v. *K.S. Sethi*[1], is clearly brought out in the following passages:

"The definition of industry in section 2 (*j*) of the Industrial Disputes Act, 1947 is in two parts. But it must be read as a whole. So read, it denotes a collective enterprise in which employers and employees are associated. It does not exist either by employer alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. But every case of employment is not necessarily productive of an industry. A workman is to be regarded as one employed in an industry only if he is following one of the vocations mentioned in relation to the employers namely, any business, trade, undertaking, manufacture or calling of employers. In the collocation of the terms and their definitions these terms have a definite economic content of a particular type and on the authorities of this Court have been uniformly accepted as excluding professions and are only concerned with the production, distribution and consumption of wealth and the production and availability of material services. Industry has thus been accepted to mean only trade and business, manufacture, or undertaking analogous to trade or business for the production of material

1. (1970) 2 S.C.J. 755: (1971) 1 S.C.R. 177: A.I.R. 1970 S.C. 1407.
2. C.A. No. 1292 of 1970.

services. Material services involve an activity carried on through co-operation between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis is not on what they do but upon the productivity of a service organised as an industry and commercially valuable, in which, something is brought into existence quite apart from the benefit to particular individuals; and it is the production of this something which is described as the production of material services. Thus, the services of professional men involving benefits to individuals according to their needs, such as doctors, teachers, lawyers, solicitors, etc., are easily distinguishable from an activity such as transport service. They are not engaged in an occupation in which employers and employees co-operate in the production or sale of commodities or arrangement for the production or sale or distribution; and their services cannot be described as material services and are outside the ambit of industry. It, therefore, follows that before an industrial dispute can be raised between employers and employees or between employees and employees in relation to the employment or non-employment or the terms of employment or with the conditions of labour of any person, there must first be established a relationship of employers and employees associating together, the former following a trade, business, manufacture undertaking or calling of employers in the production of material goods and and material services and the latter following any calling, service, employment, handicraft or industrial occupation or avocation of workmen in aid of the employer's enterprise. It is not necessary that they must be analogous to trade or business in a commercial sense."

14. "The decision in *State of Bombay* v. *Hospital Mazdoor Sabha*[1], holding that a Government Hospital was an industry took an extreme view of the matter and cannot be justified, because: (*a*) it was erroneously held that the second part of the definition of "industry" was an extension of the first part, whereas, they are only the two aspects of the occupation of employers and employees in an industry; (*b*) it was assumed that economic activity is always related to capital or profit-making and since an enterprise could be an industry without capital or profit-making it was held that even economic activity was not necessary; and (*c*) it was held that since a hospital could be run as a business proposition and for profit by private individuals or groups of individuals a hospital run by Government without profit must also bear the same character. This test was wrongly evolved from the observations in *Federated Municipal and Shire Council Employees of Australia* v. *Melbourne Corporation*.[1], which only indicate that in these activities in which Government take to *industrial ventures* the motive of profit-making and absence of capital are irrelevant. The observations, on the contrary show that industrial disputes occur only in operations in which employers and employees associate to provide what people want and desire, that is, in the production of material goods or services and not the "satisfaction of material human needs".

15. In the majority judgment in Civil Appeal No. 1290 of 1970 the legal position is summarised thus:

> "To summarise, an activity can be regarded as an 'industry' within the meaning of section 2 (*j*) only if there is relationship of employer and employees and the former is engaged in "business, trade, undertaking, manufacture or calling of employers" and the latter, 'in any calling, service, employment, handicraft or industrial occupation or avocation'. Though 'undertaking' is a word of large import and it means anything undertaken or any project or enterprise, in the context in which it occurs, it must be read as meaning an undertaking analogous to trade or business: In order that an activity

1. 1960 S.C.J. 679 : (1960) 2 S.C.R. 866.

1. 26 C.T.R. 508.

may be regarded as an undertaking analogous to trade or business, it must be 'organised or arranged in a manner in which trade or business is generally organised or arranged'. It must not be casual nor must it be for oneself nor for pleasure, and it must rest on co-operation between employer and employee who associate together with a view to production, sale or distribution of material goods or material services. It is entirely irrelevant whether or not there is profit motive or investment of capital in such activity. Even without these two features an activity can be an undertaking analogous to trade or business. It is also immaterial 'that its objects are charitable or that it does not make profits or even where profits are made, they are not distributed amongst the members', *Federation of Indian Chamber of Commerce and Industry* v. *R.K. Mittal*[1] or that its activity is subsidised by the Government. Again it is not necessary that 'the employer must always be a private individual .... The Act, in terms, contemplates case of industrial disputes where the Government or a local authority or a public utility service may be the employer.......*Secretary Gymkhana Club Employee's Union* v. *Management of the Gymkhana Club*[2]. It also makes no difference that the material services rendered by the undertaking are in public interest. The concept of public interest in a modern welfare State, where new social values are fast emerging and the old dying out, is indeed so wide and so broad and comprehensive in its spectrum and range that many activities which admittedly fall within the category of 'industry' are clearly designed to subserve public interest. In fact, whenever any industry is carried on by the Government, it would be in public interest, for the Government can act only in public interest. Whether an activity is carried on in public interest or not can, therefore, never be a criterion for determining its character as an industry."

1. (1972) 2 S.C.J. 61: (1972) 2 S.C.R. 353 at 376: A.I.R. 1972 S.C. 763.
2. (1968) Lab.I.C. 547 : (1968) 2 S.C.J. 138: (1968) 2 An.W.R. (S.C.) 6: A.I.R. 1968 S.C. 554.

16. Even in the dissenting judgment, the same conclusion is reached as regards the legal position. In the words of the learned Judge, the ratio of the decisions of the Supreme Court is:

> "Even where a trade, business, undertaking, manufacture or calling of employers results in production of material goods or rendering of material services, such an undertaking engaged in trade, business, manufacture or calling of employers will not be an industry if it is run on charitable principles or is run by Government or local body as part of its duty. In other words, whenever an undertaking is engaged in activity which is not done with a view to exploit it in a trading or commercial sense but for public interest and without any profit motive or in the form of social service or in the form of activity intended to benefit the general public it will not be an industry."

If we apply this test, certainly it could not be said that the Public Works Department in respect of the construction of Government buildings, such as hospitals colleges, schools and Court buildings, is engaged in an activity with a view to exploiting it in a trade or commercial sense.

17. The learned counsel for the petitioner relied on the decision of the Supreme Court in *Corporation of City of Nagpur* v. *Its Employees*[1]. Dealing with the question whether the Public Works Department of the Corporation of the City of Nagpur is an industry, the Supreme Court observed:

> "(*xii*) *Public Works Department:* This department is in charge of construction and maintenance of public works such as roads, drains, building, markets, public latrines, etc. For the convenience of the public, this department is divided into zones and every zone has its office. The outdoor staff in the Public Works Department consists of Assistant Engineers, Overseers, Sub-overseers, time-keepers, mates car-

1. (1960) 1 L.L.J. 523 : (1960) 2 S.C.R. 942 : (1961) 2 S.C.J. 134: A.I.R. 1960 S.C. 675.

penters, masons, blacksmiths and coolies. The other staff, consisting of clerks and peons, performs indoor duties (*See* the evidence of witness 5 for part 1) This department performs both administrative and executive functions. The services rendered are such that they can equally be done by private individuals and they come under the definition of 'industry', satisfying both the positive and negative tests laid down by us in this regard. We, therefore hold. that this department is an industry."

18. At the time when this decision was rendered the decision in *State of Bombay and others* v. *Hospital Mazdoor Saba*[1], was holding the field. One of the tests for determination whether an activity was an undertaking or not within the meaning of section 2 (*j*) was an enquiry into whether an activity of a like nature would be an undertaking if it is carried on by a private citizen or a group of private citizens. The decision in *Safdarjung Hospital case*[2], disapproved of this test. In the latest judgment in Civil Appeal No. 1129 of 1970, this position was noticed by the majority judgment and in the words of the learned Judges :

> "There was also one other ground on which the decision in the *Safdarjung Hospital case*[2], disapproved of the view taken in the *Hospital Mazdoor Sabha case*[1] and that ground was that the decision in the *Hospital Mazdoor Sabha case*[1] proceeded on an erroneous basis that an activity, in order to be an undertaking analogous to trade or business, need not be an economic activity and applied a wrong test, 'can such activity be carried on by private individuals or group of individuals?' It would, therefore, seem that, in view of the decision in *Safdarjung Hospital case*[2], this latest test applied in the *Hospital Mazdoor Sabha case*[1] must be rejected as irrelevant and it must be held that an activity, in order to be recognized as an undertaking analogous to trade or business must be an economic activity in the sense that it is productive of material goods or material services."

1. 1960 S.C.J. 679 : (1960) 2 S.C.R. 866 : (1960) 1 L.L.J. 251 : A.I.R. 1960 S.C. 610.
2. (1970) 2 S.C.J. 755 ; (1971) 1 S.C.R. 177.

19. In view of the decisions in *Safdarjung Hospital case*[1] and Civil Appeal No. 1297 of 1970, it is not open to the learned counsel for the petitioner now to rely on the decision in *Corporation of City of Nagpur* v. *Its Employees*[2].

20. I am, therefore, of opinion that the Public Works Department is not an industry in respect of its activities relating to construction of Government buildings, such as hospitals, colleges, schools and Court buildings. The writ petitioner was not employed in any other work of the Public Works Department and, therefore, it is not necessary for me to consider in general, whether the Public Works Department is carrying on any industry in respect of any other activity.

21. The Government, as an employer, therefore, was entitled to regulate the conditions of service of the petitioner and persons similarly situated. The impugned Government Order is, therefore, not liable to be quashed.

22. In the result, both the writ petitions are liable to be dismissed and accordingly they are dismissed. But, there will be no order as to costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, CJ.* and *Sethuraman, J.*

M. C. Chockalingam and others .. *Appellants**

v.

State of Madras, represented by the Collector of Madras .. *Respondent.*

Land Acquisition Act (1 of 1894), section 18—Acquisition of land—Value for acquisition—Value fixed for Urban Land Tax—Value for acquisition should not be different from value for urban land tax assessment.

The Government acquired a land measuring more than 7 grounds for constructing

1. (1970) 2 S.C.J. 755: (1971) 1 S.C.R. 177.
2. (1961) 2 S.C.J. 134: (1960) 2 S.C.R. 942: (1960) 1 L.L.J. 523.

* Appeal No. 16 of 1969. 19*th February*, 1975.

a bus stand. In fixing the value there was a dispute. The value for acquisition was fixed at Rs. 10,000 per ground. But a land nearby belonging to the appellant was valued at Rs. 16,000 per ground for purposes of assessment to urban land tax. On appeal arising out of a reference under section 18 of the Land Acquisition Act,

Held: Government cannot value the same land at one figure for purposes of land acquisition and at another figure for purposes of levy of urban land tax. The assessment for purposes of urban land tax has to be taken to be fair and reasonable and the land assessed to urban land tax was comparable to the land under acquisition, and they formed part and parcel of a larger extent. [*Para.* 2.]

Appeal against the decree of the City Civil Court (IV Asst. Judge) Madras and passed in L.A.C. No. 51 of 1965.

V. R. Venkataraman, for Appellant.

The Additional Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—This is an appeal arising out of a land acquisition reference under section 18 of the Act. The purpose of the acquisition was to provide a State Transport Bus Stand at Raja Annamalaipuram. This is a very busy and important crowded locality. The notification under section 4 (1) was made on 5th June, 1963, and there was a correction about the area to be acquired by another notification, dated 17th March, 1965. The total extent sought to be acquired was 7 grounds 503 sq. ft. The Land Acquisition Officer fixed the value at Rs. 10,000 per ground, which was confirmed in the reference under section 18. The basis for this assessment of the value was Exhibit B-8, dated 10th August, 1961, relating to No. 4313/2 of an extent of 2 grounds 923 sq. ft. The document supported a rate of Rs. 7,755 per ground. But subsequently, for purposes of urban land tax, the remaining extent of land, excluding the land acquired, has been valued at the rate of Rs. 16,000 per ground. The assessment order is, dated 30th October, 1971. The Assistant Commissioner of Urban Land Tax relied on a document, dated 24th December, 1962, which was nearer to the date of the notification in this case. That document conveyed premises No. 38, Ramakrishna Mutt Road, which is a few houses away from the land under acquisition. The land measured 1,368 sq. ft. and there was a building thereon, which was valued at Rs. 5,855. The sale of the premises was for a sum of Rs. 15,000. Deducting the value of the building, the value of the land was ascertained as Rs. 9,145, which worked out a rate of Rs. 16,000 per ground. The very appellants, in respect of the very land, of which the acquired land formed a part, have been assessed in that way and had been directed to pay urban land tax on that basis.

2. It is obvious that Government cannot value the same land at one figure for purposes of land acquisition and at another figure for purposes of levy of urban land tax. We are told that the appellants here do not propose to file an appeal against this order as assessment to urban land tax. We have to take this assessment for purposes of urban land tax to be fair and reasonable and that land is comparable to the land under acquisition, and they formed part and parcel of a larger extent.

3. Considering, however, the fact that the later sale deed for purposes of urban land tax related only to an extent of 1,368 sq. ft., and the land under acquisition is of an extent of 7 grounds 503 sq. ft., we may make allowance for it and reduce the market value from Rs. 16,000 to Rs. 15,000 per ground. We accordingly raise the market rate from Rs. 10,000 to Rs. 15,000. There will be a decree accordingly. The appeal is allowed with proportionate costs.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

Sherija Bi .. *Appellant**

v.

Vedanayakam Pillai and others .. *Respondents.*

Mortgage—Suit on mortgage decreed—First respondent suing to cancel the mortgage decree—Congenitally deaf and dumb—Not properly represented—Decree set aside.

The second defendant had filed a suit against *V* and the second respondent on a mortgage. The second respondent, mother of *V*, represented *V* as though he was a minor. A decree was passed and the second defendant sought to bring the properties to sale in execution. *V* filed a suit for cancellation of the decree and for declaration of his title and possession of the suit properties. It was admitted by the defendants that *V* was congenitally deaf and dumb. Further on the date of the prior suit on the mortgage, *V* had attained majority.

Held, the decree in the previous suit was, in the circumstances, a nullity, *V* was at liberty to sue for partition and separate possession of his half share in the properties. [*Para.* 5.]

Appeal against the decree of the District Court, Salem in Appeal Suit No. 211 of 1966, preferred against the decree of the Court of the Subordinate Judge of Salem in Original Suit No. 31 of 1963.

K. Parasaran, for Appellant.

K. Doraiswamy, for Respondent.

The Court delivered the following

JUDGMENT.—The third defendant is the appellant. The first respondent—plaintiff, the son of the first defendant and one Ramaswami, filed the suit for cancellation of a mortgage decree obtained by the second defendant against himself and his mother in O.S. No. 195 of 1951 on the file of the Sub-Court, Salem, declaration of his title to the suit properties which are 78 acres of lands and an injunction restraining the fourth defendant (third respondent herein) from interfering with his possession of the suit properties. According to the first respondent, his father Ramaswami left 40 acres of ancestral lands and they were sold by the second respondent and with the sale proceeds she purchased the suit lands from the second defendant (whose legal representatives are respondents 4 to 11 herein) under Exhibit B-4 in 1942 for Rs. 8,750 in the names of herself and the first respondent and executed a mortgage under Exhibit B-1 for Rs. 4,000 in favour of the second defendant and it is not binding on him. The further case of the first respondent was that the second defendant filed O.S. No. 195 of 1951 against him as though he was a minor represented by his mother as guardian though, in fact, he was major and his interests were adverse to those of his mother and he was not properly represented and therefore, the decree passed in that suit was not binding on him. The properties were brought to sale in E.P. No. 136 of 1958, in execution of the decree passed in O.S. No. 195 of 1951 and the appellant has purchased the same for Rs.6,010. The first respondent's case was that the execution proceedings and sale were not valid and binding on him on the ground that the decree is void and the properties were really worth a lakh of rupees, but were sold for Rs. 6,010, and he came to know of the decrees and the execution proceedings only ten days before the institution of the present suit.

2. Defendants 2 to 4 alone contested the suit. Their case was that the first respondent was congenitally deaf and dumb and was unable to manage his own affairs and that he must be represented by the next friend in the suit and that the present suit filed by the first respondent without a next friend is not maintainable. They further contended that the first respondent is not the owner of the suit properties and that, if at all, he would be entitled only to a half share in the properties on the ground that the sale deed had been obtained in the names of himself and the second respondent.

*S.A. No. 1383 of 1972.

17*th November*, 1975.

3. On the basis of the admission in the written statement of the defendants 2 to 4 that the first respondent was congenitally deaf and dumb and was unable to manage his own affairs and should have been represented by a next friend in the suit when it was instituted, the learned Subordinate Judge held that the decree obtained in O.S. No. 195 of 1951 on the basis that the first respondent was a minor represented by his mother as the guardian and not on the basis that he was a congenitally deaf and dumb person unable to manage his own affairs, was valid and binding on the first respondent. The learned Subordinate Judge further found that the properties do not belong absolutely to the first respondent, but belong to both respondents 1 and 2 and held that the decree in O.S. No. 195 of 1951 is not void and not vitiated by fraud and that the execution proceedings in E.P. No. 136 of 1958 are binding on the first respondent. In that view, he dismissed the suit with the costs of the contesting defendants. On appeal, the learned District Judge found that there is no evidence to show that the first respondent's father left ancestral properties to the extent of 40 acres at the time of his death and that they were sold by the second respondent and that the subsequent purchase of the present suit properties was from out of the sale proceeds of those 40 acres of lands. However, he held that, having regard to the fact that the sale had been obtained in the names of both the respondents 1 and 2, the first respondent had a half share in the properties. After coming to this conclusion, the learned District Judge called for a finding from the Sub-Court as to whether the first respondent was congenitally deaf and dumb and was unable to manage his own affairs, as to the date on which the first respondent attained majority and as to the value of the properties. Subsequently, the plaint was amended and it was alleged that the first respondent is congenitally deaf and dumb and is unable to manage his own affairs, and the defect in not filing the suit through a next friend was cured. The learned Subordinate Judge thereafter found, on the admission of defendants 2 to 4 that the first respondent is congenitally deaf and dumb and is unable to manage his own affairs and should have been represented by a next friend in the present suit, that he was congenitally deaf and dumb and was unable to manage his own affairs and should have been represented by a next friend in the suit. On the other two questions, he found that the first respondent had attained majority on 16th September, 1951 prior to the institution of O.S. No. 195/51 which was on 1st October, 1951 and that the properties would be worth Rs. 1,500 per acre at the relevant time. The learned District Judge accepted the findings and held that the first respondent was congenitally deaf and dumb and was unable to manage his own affairs and should have been represented in O.S. No. 195 of 1951 by a guardian on that basis, but was put forward as a minor and a guardian had been appointed for him on that basis in the suit instituted on 1st October, 1951 although he had attained majority on 16th September, 1951 and was a major on the date of the suit, and held that the mortgage decree and the execution proceedings were therefore void to the extent of the first respondent's share in the properties, and accordingly granted a declaration to that extent and also a decree for injunction.

4. It is not possible to uphold the decree of the learned District Judge for injunction, having regard to his own finding that even the 2nd respondent had title. The first respondent was entitled only to his half share in the suit properties and the decree in O.S. No. 195 of 1951 and the further execution proceedings are void and not binding on him to the extent of only his share and the appellant who is the purchaser in the execution sale would then be a co-owner against whom there cannot be a decree for injunction. The appellant had become entitled to the second respondent's half share by the Court sale. The right of the first respondnet would only be to sue for partition and separate possession of his half share in the properties which are not joint family properties.

5. Now it has been found that the first respondent had attained majority on 16th September, 1951 and was a major on the date of institution of the suit, O.S. No. 195 of 1951 on 1st October, 1951. His mother had been appointed as his guardian in that suit on the basis that he was a

minor. There was no proper representation of the first respondent in that suit as he was a major and a guardian had been appointed for him on the basis that he was a minor on the date of the suit. Mr. Parasaran, learned counsel for the appellant argues that inasmuch as a guardian had been appointed in the prior suit for the first respondent, his interests had been protected and that the fact that he was not described in the previous suit as a congenitally deaf and dumb person unable to manage his own affairs would not affect the rights of the appellant. It is not possible to accept this contention. The appointment of the guardian in the previous suit was on the basis that the first respondent was a minor, whereas, on the date of the institution of that suit, he was a major. It was not on the basis that he was congenitally deaf and dumb unable to manage his own affairs, and the appointment of guardian was therefore not proper. The decree in the previous suit was therefore a nullity as has been rightly found by the learned District Judge so far as the first respondent is concerned. Therefore, it is not possible to make any provision for the payment of the proportionate liability of the first respondent under the mortgage, Exhibit B-1, which is stated to have been executed for part of the consideration for the purchase of the properties in the names of the first and second respondents. Under the circumstances, the second appeal is allowed only in part to the extent of the injunction and is otherwise dismissed. The first respondent is at liberty to sue for partition and separate possession of his half share in the properties. Respondents 4 to 11, the L.Rs of the second defendant may take such steps as they may be advised in respect of any liability of the first respondent under the mortgage, Exhibit B-1. There will be no order as to costs. No leave.

S.J. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *V. Ramaswami and V. Sethuraman, JJ.*

Ramaswamy Reddiar .. *Appellant**

v.

The State of Tamil Nadu represented by Divisional Development Officer, Chidambaram and another. .... *Respondents.*

Tamil Nadu Panchayats Act (XXXV of 1958), section 26 (1)—President—Non-payment of house-tax within the time prescribed—No demand made—Whether suffered disqualification.

The president of a panchayat failed to pay the house-tax within the time prescribed. However no demand had been made on him. He paid the tax after the due date. The Divisional Development Officer intimated the president that he had suffered disqualification under section 26 (1) of the Panchayats Act, 1958 by reason of non-payment of house-tax within the time prescribed. The president failed before the Judicial authority and filed a writ petition where also he failed. On further appeal,

Held, the liability to pay the tax within the period of two months prescribed was not dependent on any bill or notice being issued. On the facts of the case, the appellant had incurred the disqualification. [*Para.* 2.]

Cases referred to:—

Mohammad Ismail Maracayar v. *Melacheval Panchayat*, (1964) 77 L.W. 520; *Chandkhan* v. *W.N. Govind*, A.I.R. 1973 Bom. 1; *M.R. Raghupathy* v. *A. B. Ramachandra Reddy and another*, W.P. No. 2663 of 1970, dated 16th September, 1970.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Justice Ramanujam dated 21st October, 1975 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 6583 of 1975

*W.A. No. 311 of 1975. *17th November, 1975.*

presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records on the file of the District Munsif, Cuddalore, in O.P. No. 5 of 1975 and dated 13th September, 1975, in dismissing the application filed by the petitioner under section 28 (1) and (2) of the Panchayat Act, 1958 for nullifying the disqualification of the petitioner as Panchayat President of Malayaperumal Agaram and in confirming the order of the respondent in his proceedings in NA No. 2.52271 of 1974, dated 2nd January, 1975 and quash the proceedings.

B. Lakshminarayana Reddy, for Appellant.

The Judgment of the Court was delivered by

Ramaswami, J.—This is an appeal against the decision in W.P. No. 6583 of 1975. The appellant was the President of Malayaperumal Agaram Panchayat within Cuddalore Panchayat Union Council. In his proceedings dated 2nd January, 1975 the Divisional Development Officer, Chidambaram, intimated the appellant that he had ceased to hold office of President, as he had been disqualified under section 26 (1) of the Tamil Nadu Panchayats Act, 1958 (hereinafter called the 'Act,' for non-payment of house-tax for the assessment years 1973-74 and 1974-75 within the time prescribed. But the same proceedings the appellant was informed that he could apply to the prescribed judicial authority under section 28 of the Act on the question as to whether he had become disqualified. Thereafter the appellant filed O.P. No. 5 of 1975 on the file of the District Munsif's Court, Cuddalore, for a declaration that the appellant was not disqualified and for cancellation of the order of the Divisional Development Officer, Chidambaram, dated 2nd January, 1975. In his order dated, 13th September, 1975, the learned District Munsif of Cuddalore held that the appellant had failed to pay the tax in time for the assessment years 1973-74 and 1974-75 and that, therefore, he was disqualified. In view of section 26 (i) of the Act he ceased to hold the Office of President by reason of such disqualification. The appellant filed a writ petition praying for the issue of a writ of *certiorari* to quash this order. It was contended before the learned single Judge that on the day when the first respondent *viz.*, the Divisional Development Officer, chose to invoke the provisions of section 26 (i) of the Act, he was not in arrears of tax and that, therefore, the first respondent was not justified in passing the order in question. It was also contended before the learned Judge that section 26 (i) will come into operation only when a member fails to pay the arrears of tax and that tax can be said to be in arrears only when a bill or notice of demand is served on him requiring to pay the amount of tax within a particular period and that the tax was not paid within such a time allowed. The learned Judge held that payment of the amount within the time prescribed was the relevant criterion for determining the disqualification under section 26 (i) of the Act and even if the appellant had paid before the first respondent made the order dated 2nd January, 1975, the payment would not remove the disqualification already suffered. On merits the learned Judge held that section 26 (i) of the Act would come into operation on the failure to pay the tax within the time prescribed and neither the provisions of the Panchayats Act, nor the rules contemplate the issue of any notice or bill of demand in order to make the house-tax due from the appellant. The learned Judge also had distinguished the three decisions in *Mohammad Ismail Maracayar* v. *Melacheval Panchayat*[1], *Ghandkhan* v. *W.N. Govind*[2] and the decision in *M.R. Raghupathy* v. *A. B. Ramachandra Reddy and another*[3]. Accordingly the learned Judge held that the appellant had ceased to be a Panchayat President and dismissed the petition. It is against this order the appellant had filed this appeal.

2. The house-tax that were found to be in arrears were for the years 1973-74 and 1974-75. The tax for 1973-74 was paid on 14th September, 1974 and that for 1974-75 was paid on 14th November, 1974. Section 26 of the Act is imperative and a member ceases to hold office on incurring of any of the disqualifications referred to

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1. (1964) 77 L.W. 520.
2. A.I.R. 1973 Bom. 1.
3. W.P. No. 2663 of 1970 dated 16th September, 1970.

therein. One such disqualification is "failure to pay arrears of any kind due by him (otherwise than in a fiduciary capacity) to the Panchayat or the Panchayat union council within three months after such arrears became due." Section 120 of the Act enables the Panchayat to levy on all houses in the village house-tax and the other provisions in that section dealt with the basis and the method of levying such tax. The Act also authorises the framing of rules for the assessment and collection of all taxes due to the Panchayat. The rules relating to assessment of the house-tax provide that when the Panchayat has resolved to assess houses for the purpose of house-tax, the rates fixed by the Panchayat may either be proportionate to the value of each house, or may be progressive with reference to the value of the house. The karnam of the village shall prepare and furnish to the executive authority a house-tax assessment in the prescribed form and the executive authority should sign the same in token of accepting the assessment. The executive authority shall thereafter cause assessment books to be prepared in conformity with the house-tax assessment made by the karnam. As soon as the assessment books are prepared, the executive authority shall by beat of drum in the town give public notice thereof and of the place or places where the books may be inspected. If any objection is taken to the assessment or the valuation, the assessment books could be amended in the manner prescribed. The rules also prescribe for appeals and revisions against the order made on such objections. Subject to these provisions the assessment has been made final. If the Panchayat decides to increase the rate or revise the valuation, it shall be done only after such public notice and individual notices as prescribed in the rules. The provision is also made for correcting the assessment of individuals where it appeared to the executive authority that the property has been inadequately assessed or inadvertently or improperly omitted to be assessed. But, as already stated, if once the assessment has been made as per the provisions, it is made final. Thus, unless a general revision or special revision is made, the assessment in respect of the house-tax is continued year after year. The house-tax is payable either half-yearly or yearly as the Government may, in general notification, decide and there is no dispute in this case that the tax in respect of the Panchayat in question was payable yearly. Rule 3 relating to the collection of house-tax reads as follows:—

> "3. *Persons liable to pay house-tax.*—(1) The house-tax shall be paid by the owner of the house within sixty days after the commencement of the year.
>
> (2) If the owner of a house fails to pay the whole or any part of the house-tax due thereon within sixty days after the commencement of the year the executive authority may, if the said tax has not remained unpaid for more than twelve months, require the occupier for the time being of such house to pay the amount within a specified period, not being less than thirty days."

The general rules relating to the collection of taxes provide for distraint and sale of movable property for recovery of the amount of tax, but before such coercive proceedings are taken, the Rules require the executive authority to serve upon the person a bill for the amount due and the default of the person to pay the bill within such time as may be mentioned in that bill. On a reading of these provisions, the learned Judge had held that neither the Act nor the Rules contemplate the issue of any bill or notice demanding payment for house-tax and it shall be payable within two months of the commencement of the year in respect of which the tax was due. We are in entire agreement with this view of the learned Judge. It may be noticed that only for taking coercive proceedings when the amount was not paid within the period of two months prescribed, the rules specifically provide for the issue of a notice demanding payment within a particular time and for payment of the dues within two months no such notice was contemplated. The resolution of the Panchayat to levy the tax and the preparation of the assessment books when it becomes final automatically brings into existence a liability for payment of house-tax from the year from which the Panchayat resolved to levy the house-tax. The effect of rule 3 is to make the house-tax payable within a

period of two months from the commencement of the year. Therefore the appellant's liability to pay the tax within the period of two months prescribed is not dependent on any bill or notice being issued. The word 'year' is defined in section 2 (37) of the Act as financial year. The tax was, therefore, payable with reference to the financial year for 1973-74. Thus for 1973-74 the tax was payable on or before 30th May, 1973 and for 1974-75, it was payable on or before 30th May, 1974. The respective amounts when not paid on or before 30th May, 1973 and 30th May, 1974 became arrears and section 26 (i) of the Act allowed a further period of three months after the amounts became an arrear in order to attract the disqualification. Therefore, if the amount had not been paid by 31st August, 1973 in respect of 1973-74 and 31st August, 1974 in respect of 1974-75, the appellant incurred disqualification automatically. In this case, as already stated, the amounts were paid only on 14th September, 1974 and 14th November, 1974. The appellant had, therefore, incurred the disqualification.

3. In the appeal the learned counsel for the appellant relying on rule 32 of the Assessment and Collection of Tax Rules contended that a tax could be said to be in arrear only when a notice demanding payment was issued and the amount was not paid within the time mentioned in the notice. Admittedly in this case no notice was issued by the Panchayat and, therefore, the amount could not be stated to be in arrear. Rule 32 reads as follows:

> "32. *Recovery of arrears of tax.*—If any tax due from any person remains unpaid in whole or in part at the end of the period specified in sub-rule (i) of rule 26 and if such person has left India or cannot be found, the said tax or such part thereof as remains unpaid together with all sums payable in connection therewith shall be recoverable as if it were an arrear of land revenue."

Rule 26 (i) referred to therein relates to the distraint and sale of movable property. We have already held that this provision relating to the distraint and sale of movable property is attracted only after the amount had become in arrear by non-payment of the same within the period of two months prescribed by the rules for payment. Rule 32 in terms, therefore, applies only to a case where the amount was not paid within the period of two months and distraint proceedings were initiated and after the issue of notice for the distraint proceedings without paying the amount the person had left India or cannot be found. In such an event the arrears could be recovered as if it were an arrear of land revenue. This rule, therefore, does not make it obligatory on the executive authority to issue a notice demanding the payment of house-tax before he could be considered to be in arrear of the amount within the meaning of section 26 (i) of the Act. We are also in entire agreement with the judgment of the learned single Judge that the decisions, in *Mohammad Ismail Maracayar* v. *Melacheval Panchayat*[1] and *Chandkhan* v. *M.N. Govind*[2] related to the particular language used in the relevant provisions which were under consideration in those decisions and the provisions were not similar to the one on hand. We are also of the view that the decision in *M.R. Raghupathy* v. *A.B. Ramachandra Reddy and another*[3], related to a licence fee and since the renewal of a licence depended on the volition of the person holding the licence, the non-payment for renewal of the licence fee will not attract any disqualification.

4. In the result, the writ appeal fails and it is dismissed.

S. J. — *Appeal dismissed.*

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1. (1964) 77 L.W. 520.
2. A.I.R. 1973 Bom. 1.
3. W.P.No. 2683 of 1970, dated 16th September, 1970.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

M. Sultan Beevi *alias* **Chinna Pillai and others** ... *Petitioners**

v.

Uthumanummal ... *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 10—*Suit for redemption—Joint decree against first and second appellants and second respondent—Second respondent away at the time of filing second appeal—Petition by second respondent to transpose him as appellant—Allowed.*

The plaintiff had obtained a joint decree against the first and second appellants and the second respondent. At the time of filing the second appeal, the second respondent was away at Singapore and was therefore impleaded as second respondent. Subsequently the second respondent filed an application under Order 1, rule 10, Civil Procedure Code, to transpose him as an appellant. This was objected to by the first respondent on the ground of bar of limitation.

Held: Both in the interests of justice and to effectively adjudicate upon the dispute in question and also to avoid, any possible future technical objections the petitioner must be transposed as party appellant to the above appeal. The High Court had ample jurisdiction and wide powers to order such transposition of parties under Order 1, rule 10 of the Code of Civil Procedure. [*Para.* 7.]

Cases referred to:—

Radhaballabh Prasad Narain Singh v. *Raghunath Lal and others*, A.I.R. 1939 Pat. 397 ; *Ch. Surat Singh and others* v. *Manohar Lal and others*, A.I.R. 1971 S.C. 240; *Venukuri Krishna Reddy and another* v. *Kota Ramireddi and others*, (1954) 67 L.W. 346 : I.L.R. (1954) Mad. 1126 :(1954) 2 M.L.J. 559: A.I.R. 1954 Mad. 848.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to transpose the 2nd respondent in S.A. No. 412 of 1975 as the 3rd appellant in S.A. No. 412 of 1975 preferred to the High Court against the decree of the Court of the Subordinate Judge, Padmanabhapuram and passed in A. S. No. 29 of 1972 (O.S. No. 321 of 1969, D.M.C., Padmanabhapuram.)

K. Sreekumaran Nair, for Petitioners.

S. Padmanabhan, for Respondent.

The Court made the following

ORDER.—This petition under Order 1, rule 10 and section 151 of the Code of Civil Procedure is to transpose the second respondent in S.A. No. 412 of 1975 as the third appellant in the above said second appeal. The suit was filed against the petitioner herein and also the two appellants in the above second appeal for redemption. The petitioner herein is no other than the son of the first appellant and the brother of the second appellant. The decree is a joint decree and it is executable against the petitioner and also against the appellants 1 and 2 herein jointly. It is clear from the facts of the case that since the petitioner was away in Singapore at the time of filing the second appeal and since there was some delay in sending the vakalath, the petitioner was impleaded as the second respondent in the second appeal.

2. This application to transpose is opposed by the first respondent purely on the ground that the petitioner must file an independent second appeal and also the right under the law of limitation has accrued to the first respondent herein. Mr. Sreekumaran Nair the learned counsel for the petitioner and also first and second appellants in the above second appeal submits that there is absolutely no conflict of interest between the appellants now on record and the petitioner herein and further the appellants are agreeable for such a transposition. He cited *Radhaballabh Prasad Narain Singh* v. *Raghunath Lal and others*[1] wherein some Privy Council reports have also been referred to. In that decision a Bench of the Patna High Court has held as follows :

*C.M.P. No. 4801 of 1975 in S.A. No. 412 of 1975. 9th July, 1975.

1. A.I.R. 1939 Pat. 397.

"The Court including the High Court in second appeal, has power at any stage under Order 1, rule 10, to permit a transposition of parties. The power is discretionary and its use will depend upon the circumstances of the particular case. The purpose of it is to enable the Court to be in a position to determine the real questions in controversy between the parties and to avoid allowing a mere technical objection successfully to defeat a just claim."

3. As I have stated already, it is a joint decree which can be executed jointly against the appellants now on record and also the petitioner herein. Order 41, rule 4 of the Code of Civil Procedure says:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be."

Thus, it is clear that the petitioner even without filing an appeal himself can have the benefits of the decree on the appeal now filed by the appellants herein.

4. Order 1, rule 10 (2) of the Code of Civil Procedure, is wide enough to give discretion to this Court to transpose the necessary party if it finds that he can effectively along with the appellants put forth the contention in respect of a joint decree got against the appellants and also the petitioner herein.

5. Mr. Padmanabhan, the learned counsel appearing for the first respondent cited a decision in *Ch. Surat Singh and others* v. *Manohar Lal and others*[1] wherein it has been held that the appeal has to be dismissed for want of necessary party to the appeal. That was a case in which the party deliberately omitted to implead the necessary party in the appeal. In those circumstances the Supreme Court under Order 41, rule 20 of the Code of Civil Procedure dismissed the appeal. I do not think it has any relevance when dealing with the present case on different facts and circumstances.

1. A.I.R. 1971 S.C. 240.

6. Mr. Padmanabhan also cited a decision is *Venukuri Krishna Reddi and another* v. *Kota Ramireddi and others*[1], which dealt with Order 41, rule 33 of the Code of Civil Procedure, giving right to the parties concerned, questioning the respondent's right to get the benefit of the decree obtained by the appellants. I do not think the present case will come under that category.

7. The question as to whether the petitioner remaining as respondent will be in a position to effectively agitate the matter in appeal in case the appellants fail in the above appeal and as to whether the benefits will be questioned by the first respondent herein under Order 41, rule 33 of the Code of Civil Procedure, in case the appellants succeed in the above appeal will all be technical objections on a future date. The facts are quite simple and the decree is a joint one, which is against the appellants and also the petitioner herein. Both in the interests of justice and to effectively adjudicate upon the disputes in question and also to avoid any possible future technical objections it is but fair that the petitioner herein must be transposed as party appellant to the above appeal. This Court has ample jurisdiction and wide powers to order such transposition of parties under Order 1, rule 10 of the Code of Civil Procedure. In the circumstances this petition is ordered as prayed for.

S.J. —— *Petition allowed.*

1. (1954) 67 L.W. 346 : I.L.R. (1954) Mad. 1126 : (1954) 2 M.L.J. 559 : A.I.R. 1954 Mad. 848.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

Paramasiva Moopan and others .. *Appellants**

v.

Aruppukottai Chockalingapuram Chokkanathaswami through its Executive Officer K. Vayanakkam and others ... *Respondents.*

Civil Procedure Code (V of 1908), section 11—Res judicata—*Temple—Suit by tenant of land against temple for title—Decision against temple—Subsequent suit by temple for declaration of title—Plea of temple not being properly represented in prior suit—Decision in prior suit,* res judicata.

A temple leased out certain lands. The tenant claiming title to the suit property filed a suit for declaration of his title which though dismissed by the trial Court, was decreed on first appeal and affirmed on second appeal. The temple was represented in the proceedings by a properly constituted trustee '*R*' who had been appointed by the Endowments Department as the fit person to perform, the functions of the trustees pending the disposal of scheme proceedings relating to the temple. Subsequently, the temple filed the present suit for declaration of its title on the ground that it was not properly represented in the earlier suit and the decision in the earlier suit was not *res judicata.* The trial Court dismissed the suit, but on appeal, the suit was remanded. An appeal preferred against the order of remand was dismissed. The trial Court again dismissed the suit as barred by *res judicata.* However, on appeal, the suit was decreed on the ground that the temple was not properly represented and there was gross negligence by '*R*' in the conduct of the prior suit. On second appeal by the tenant,

Held, the learned District Munsif had rightly held that '*R*' properly represented (the temple) in the prior litigation where it was decided that (the temple) had no title and the decision in the prior litigation constituted *res judicata.* [*Para.* 5.]

*S.A. No. 1189 of 1972. *29th October,* 1975.

Cases referred to:—

Sankaranarayana Ayyar v. *Sri Poovannatha Swami Temple,* I.L.R. 1950 Mad. 191: 62 L.W. 508 : (1949) 2 M.L.J. 171 : A.I.R. 1949 Mad. 721 ; *Jagadindra Nath Roy v. Hemanta Kumari Debi* (1904) I.L.R. 32 Cal. 129 (P.C.) : 31 I.A. 203 : 6 Bom. L.R. 765 : 8 C.W.N. 809 ; *Pramatha Nath Mullick* v. *Pradyumma Kumar Mullick,* (1925) I.L.R. 52 Cal. 809 (P.C.) : 49 M.L.J. 30 : 52 I.A. 245 : 87 I.C. 305 : A.I.R. 1925 P.C. 139 ; *Vidya Varuthi* v. *Baluswami Ayyar,* (1921) I.L.R. 44 Mad. 831 (P.C.) : 41 M.L.J. 346 : 48 I.A. 302 : A.I.R. 1922 P.C. 123 ; *Surendra Krishna Roy* v. *Shree Shree Ishwaree Bhubaneswari Thakurani,* (1932) I.L.R. 60 Cal. 54; *Rajendranath Dutt* v. *Shaik Muhammad Lal,* (1881) I.L.R. 8 Cal. 42 (P.C.) : 8 I.A. 135 ; *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji,* (1941) I.L.R. 2 Cal. 128; *Iswar Shridhar Jieu* v. *Jahor Lal,* (1944) 49 C.W.N. 37 : *The Ongole Byragi Mutt* v. *Kanhayya,* (1959) 2 An.W.R. 294: A.I.R. 1960 A.P. 98 ; *Prosanno Kumari Debya* v. *Gulab Chand Baboo,* (1875) 2 I.A. 145 : 4 B.L.R. 450 ; *The Masjed Shahid Ganj* v. *S.G.P. Committee,* I.L.R. (1940) Lah. 493 (P.C.): 67 I.A. 251 : (1940) 2 M.L.J. 903 : A.I.R. 1940 P.C. 116.

Appeal against the decree of the Court of the Subordinate Judge, Sivaganga in Appeal Suit No. 206 of 1970, preferred against the decree of the Court of the District Munsif of Manamadurai in Original Suit No. 217 of 1964.

R. Gopalaswamy Ayyangar and *M. Srinivasan,* for Appellants.

A. Sundaram Ayyar and *P. Balasubramanian,* for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 2 to 4 and the legal representatives of the first defendant, who succeeded in the trial Court, but failed in the lower appellate Court, are the appellants herein. The first respondent 1st plaintiff is the deity, Aruppukottai Chockalingapuram Chokkanathaswami, and respondents 2 to 4 herein (plaintiffs 3 to 5) are its trustees. The suit was for declaration of the first respondent's title to four items of lands and for

possession. The case of the respondents was that all the four items of the suit lands were originally comprised in the Aruppukottai Zamin village. Items 2 and 3 were granted by the Zamindarini to the first respondent in 1803-1804, while items 1 and 4 were granted to the first respondent by a Pathadappu Kararnama document Exhibit A-2, dated 20th August, 1899 executed in favour of the Zamindar. The first respondent was in possession of all the four items by leasing them out. After the estate was abolished and taken over on 7th April, 1949 under Madras Act XXVI of 1948, one Somasundaram Pillai claimed patta for the first respondent on the ground that they were the first respondent's private lands. His application for grant of patta was dismissed. The first defendant Adaikala Moopanar manoeuvred to obtain patta in his name, and in the appeal filed by the first respondent against the order directing the grant of patta to the first defendant, an order for remand was passed by the Director of Settlement and ultimately patta has been granted to the first respondent. The deceased first defendant filed O.S. No. 123 of 1958, on the file of the trial Court, for declaration of his title to the suit lands and for an injunction restraining the first respondent from interfering with his possession but failed in the trial Court, which dismissed the suit on 26th February, 1960. Exhibit A-59 is the certified copy of the judgment in that suit. On appeal, the suit was decreed in A.S.No. 39 of 1960 as seen from Exhibit A-60. Then, the first respondent filed S.A.No. 1576 of 1961 against the decree in A.S. No. 39 of 1960, and it was held in the second appeal as per Exhibit A-61 that the first respondent had no title, but the deceased first defendant (plaintiff in that suit) was in possession and entitled to the injunction, although it had not been found whether he had title to the suit lands or not. Thereafter, the present suit has been filed for declaration and possession on the basis that the decision rendered in S.A.No.1576 of 1961 does not constitute *res judicata* the contention being that the first respondent was not properly represented in the previous action. The defence was that the first defendant was a ryot entitled to the suit lands and had perfected title to the same by adverse possession and that the present suit was barred by *res judicata* by virtue of the decision in S.A.No. 1576 of 1961. The Trial Court originally considered the question of *res judicata* as a preliminary issue and upheld the plea and dismissed the suit. But, on appeal, it was held that there was no bar of *res judicata*, and there was an order of remand of the suit for trial on the other issues. Then C.M.A.No. 167 of 1968 was filed in this Court against the order of remand. Ramaprasada Rao, J., dismissed the said appeal, observing thus:

> "Suffice it, however, to say that when the main objection of the temple was that the earlier decision was rendered at a time when proper parties were not before the Court, then that issue has to be gone into, and if ultimately the temple succeeds in establishing that fact, then certainly the earlier decision would not operate as *res judicata*. If, on the other hand, the temple fails to prove that they were not properly represented during the three stages when the litigation was fought out, then it follows automatically that the earlier decision of this Court and the findings of the Courts below in O.S. No. 123 of 1958 and the appeal thereon will be a bar to the present action."

After the remand, the trial Court held that the first respondent deity had title to the suit lands, but lost it by the adverse possession of the first defendant, that the first respondent was properly represented in the prior action by one Ramaswami Naicker who had been appointed as the fit person by the Deputy Commissioner, Hindu Religious and Charitable Endowments Department, under Exhibit A-45, dated 26th December, 1961 to perform the functions of the trustee pending the disposal of the scheme proceedings, and that the decision rendered in S.A. No. 1576 of 1961 was *res judicata*, and dismissed the suit. But, on appeal it has been held by the learned Subordinate Judge that the first defendant had not acquired title to the suit lands by adverse possession, that the title of the first respondent subsists and that the decision in S.A.No. 1576 of 1961 does not constitute *res judicata* for two reasons *viz.*: (1) that Meenakshisundaram Pillai and Ulagammal, who are now said to be trustees along with

some others, were the erstwhile trustees and they had not been made parties and therefore there was no proper representation of the first respondent; and (2) that there was gross negligence in the conduct of the prior suit by Ramaswami Naicker and thus the lower appellate Court has allowed the appeal, decreeing the suit as prayed for with costs throughout.

2. The questions arising for consideration in this second appeal, therefore, are:

(1) Whether the decision in S.A. No. 1576 of 1961 constitutes *res judicata?*

(2) Whether the appellants have acquired title to the suit lands by prescription?

3. The learned District Munsif has considered the question of *res judicata* in paragraphs 21 to 27 of his judgment and has observed in paragraph No. 27 that in the prior suit the first respondent was represented by Somasundaram Pillai, a hereditary trustee, Sankaralinga Moopanar, the Chairman of the Board of Trustees appointed by the Hindu Religious and Charitable Endowments Department, and Ramaswami Naicker, the fourth plaintiff who was appointed as the fit person by that Department to perform the functions of the trustees and they fought the prior litigation up to the High Court, that the order under Exhibit A-45, appointing Ramaswami Naicker as the fit person, showed that he was fully competent to represent the first respondent and he was even now looking after the affairs of the first respondent and was solely authorised to conduct the present suit as seen from Exhibit A-76 and that the contention that the first respondent was not properly represented in the prior suit and the appeal, was not acceptable. Therefore, he held that the first respondent had been properly and adequately represented in all the stages of the prior litigation and that the findings in the earlier suit and the appeals, therefore, operated as *res judicata* against the plaintiffs. The learned Subordinate Judge has unfortunately not considered the question whether Ramaswami Naicker, the fourth plaintiff, who was appointed under Exhibit A-45 as the fit person pending the scheme proceedings to perform the functions of the trustee of the first respondent and had been solely authorised by Exhibit A-76 to conduct the present suit, properly represented the first respondent in the prior litigation or not, but has held that Meenakshisundaram Pillai and Ulagammal, the other two plaintiffs in the suit also are the trustees and that as they had not been made parties in the prior litigation, the decisions rendered in the prior litigation culminating in S.A.No. 1576 of 1961 do not constitute *res judicata.* It is unnecessary to consider the question whether there was any gross negligence on the part of the person concerned in the conduct of the suit on behalf of the first respondent and the decision in the prior litigation will not, therefore, operate as *res judicata* in the subsequent suit, as it does not arise for consideration, the respondents not having raised the plea of negligence.

4. Ramaswami Naicker had been appointed as the fit person under Exhibit A-45 by the Deputy Commissioner, Hindu Religious and Charitable Endowments Department during the pendency of the scheme proceedings and he had been solely authorised to be in charge of the conduct of the present suit under Exhibit A-76. There is nothing on record to show that when he was acting as the fit person to discharge the functions of the trustees of the first respondent any other person also was entitled to act on behalf of the first respondent and represent the same. The suit lands were stated to belong to the first respondent deity and the other respondents are stated to be trustees only in the English sense of the term. The question whether in the absence of a *de jure* trustee, the *de facto* trustee of a public charitable or religious endowment, who is in possession and management of the institution and its other properties for the time being, is entitled to maintain a suit on behalf of the temple or the institution for the recovery of trust property held adversely to the trust by a stranger, came up for consideration in *Sankaranarayana Ayyar* v. *Sri Poovannatha Swami Temple*[1]. There Rajamannar C.J., has observed at page 196 thus:

1. I.L.R. (1950) Mad. 191 : 62 L.W. 508: (1949) 2 M.L.J. 171 : A.I.R. 1949 Mad. 721.

"In the case of a Hindu temple, the property vests in the idol, which is a juristic entity. From its very nature, the idol can act and assert its right only by a recognized human agency known as a shebait, or dharamakarta, and sometimes called trustee; see *Jagadindra Nath Roy* v. *Hemantha Kumari Debi*[1], and *Pramatha Nath Mullick* v. *Pradyumma Kumar Mullick*[2]. But such a manager by whatever term he is designated, is not the person in whom the legal title vests as in a trustee. Likewise, the head of a mutt, even though he may have the right to a part of the usufruct of the properties belonging to the mutt, is not a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration. Called by whatever name he is only the manager and custodian of the idol or the institution "Vide *Vidya Varuthi* v. *Baluswami Ayyar*[3]."

Viswanatha Sastri, J., has observed in that judgment, at pages 222—223 thus:

"I am referring to this aspect of the case, for it would introduce inextricable confusion in the administration of religious endowments if people professing to act in the interests of an idol or mutt are allowed to bring suits in the name of the idol or the institution, ignoring the manager or the head of the mutt who is living and functioning as such. As we are recognising the power of a *de facto* trustee to sue on behalf of an idol or a mutt, it is necessary that Courts should prevent this power from being abused or exercised fraudulently or collusively to the detriment of the trust by persons professing to act on behalf of and in the interest of the idol or mutt, behind the back of the *de jure* manager or head of the mutt. The law is clear that where there is a lawful shebait, dharmakartha or head of a mutt, he alone can bring the suits necessary for recovering possession of the property of the institution and otherwise protecting its interests and he alone is the proper person to represent it in a suit filed against the mutt, temple or idol, as the case may be; *Prosanno Kumari Debya* v. *Golab Chand Baboo*[1], and *Jagadindra Nath Roy* v. *Hemantha Kumari Debi*[2]. Where there is a lawful shebait or manager, until he is removed or controlled by the Court he alone can act for the idol: per Rankin, C.J., in *Surendrakrishna Ray* v. *Shree Shree Ishwaree Bhubaneswari Thakurani*[3], Indeed the Privy Council has observed that in such cases the right of suit is really in the manager or shebait, though the processual law of the country allows for a suit in the name of the idol or the deity: see *The Masjed Shahid Ganj* v. *S.G. P. Committee*[4]. Though as already stated, managers of Hindu temples are not trustees in the English sense, still, on the analogy of the co-trustees, if there are more shebaits or managers than one, they are deemed to constitute one single body, as it were, in the eye of law and all of them must normally be parties to a suit on behalf of or against the deity or the idol. If any of the managers are unwilling to be joined as plaintiffs or have themselves done acts prejudicial to the trust or otherwise precluded themselves from being plaintiffs, they should be made defendants : *Rajendranath Dutt* v. *Shaik Muhammad Lal*[5]. As regards co-trustees, strictly so-called, they stand on a different footing from joint managers or shebaits, for, the property is vested in all of them, there is unity of title and possession and their interests are joint and indivisible. But having regard to the position and status of shebaits and managers of Hindu reli-

1. (1904) I.L.R. 32 Cal. 129 (P.C.) : 31 I.A. 203 : 6 Bom.L.R. 765 : 8 C.W.N. 809.
2. (1925) I.L.R. 52 Cal. 809 (P.C.) : 49 M.L.J. 30 : 52 I.A. 245 : 87 I.C. 305 : A.I.R. 1925 P.C. 129.
3. (1921) I.L.R. 44 Mad. 831 (P.C.) : 41 M.L.J. 346 : 48 I.A. 302 : A.I.R. 1922 P.C. 123.

1. (1875) 2 I.A. 145 : 4 B.L.R. 450.
2. (1904) I.L.R. 32 Cal. 129 (P.C.) : 31 I.A. 203.
3. (1932) I.L.R. 60 Cal. 54, 77 affirmed on appeal by the P.C. in I.L.R. (1937) 2 Cal. 447.
4. I.L.R. (1940) Lah. 493 (P.C.) : 67 I.A. 251 : (1940) 2 M.L.J. 903 : A.I.R. 1940 P.C. 116.
5. (1881) I.L.R. 8 Cal. 42 (P.C.) : 8 I.A. 135.

gious endowments and their relation to the endowed property, the legal title in which vests, not in the managers but only in the deity or the idol, the rule requiring all co-shebaits or managers to joint in an action on behalf of the deity or idol is not so inexorable or incapable of exception or relaxation as in the case of co-trustees strictly so called."

At page 224, he has observed :

"There are observations of a general character in the other reported cases to the effect that all the co-shebaits or managers must join in a suit filed on behalf of the deity, whether as plaintiffs or defendants. While I agree that this should be the normal rule, I would, at the same time, express my respectful agreement with the following statement of the law by Biswas, J., in *Iswar Shridhar Jieu* v. *Jahor Lal*[1]:

'As is, however, recognised in many of these cases and is in fact implied in the statement of the rule, it cannot be maintained as an absolute rule of law that all the co-shebaits must join in representing the deity. The rule is subject to exceptions, and circumstances may exist in which the deity may be validly represented by some only of the shebaits and even by a person who is not a shebait. Where a suit is a suit by the deity represented by some of its shebaits whether all should be joined as parties is often, in the last analysis, a mere question of procedure and expediency; the test is, whe ther or not, having regard to all the circumstancs of the case, the interests of the deity may be said to be sufficiently represented.'

"See also *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji*[2].

Apart from the right of the idol or the deity to sue through its duly constituted shebait or trustee, or through its *de facto* manager, for recovery of property belonging to it, the worshippers have a right of suit in respect of the property of a deity or idol."

1. (1944) 49 C.W.N. 37 : A.I.R. 1945 Cal. 268.
2. I.L.R. (1941) 2 Cal. 128.

A similar question came up for consideration before a Full Bench of the Andhra Pradesh High Court in *The Ongole Byragi Mutt* v. *Kanhayya*[1], where the managing trustee representing a mutt filed a suit and the other trustees were added as parties after the expiry of the period of limitation, and it was held that the suit was properly constituted even at its inception and that the addition of the other trustees is not a case of imperative necessity but is only a matter of convenience or expediency. There also, the observations of Biswas, J., in *Iswar Sridhar Jieu* v. *Jahor Lal*[2], extracted in the judgment of Viswanatha Sastri, J., in *Sankaranarayana* v. *Poovannatha Swami Temple*[3], have been referred to and it has been held that the right to sue vested in the mutt and that the suits instituted by the managing trustees as representing the institution were even at the inception properly constituted.

5. Learned counsel for the respondents has not shown that Ramaswami Naicker, the fit person appointed under Exhibit A-45, pending the scheme proceedings, was not competent to represent the first respondent in the prior action. Nor has he cited any decision contrary to the aforesaid Full Bench decisions. I therefore hold that the learned District Munsif has rightly held that Ramaswami Naicker properly represented the first respondent in the prior litigation which had culminated in the decision of this Court in S.A. No. 1576 of 1961, where it had been held that the first respondent had no title and that the deceased first defendant was in possession of the suit lands and entitled to the injunction and therefore the decision in the prior litigation constitutes *res judicata*.

6. In the view that I have taken on the question of *res judicata*, it is unnecessary once again to go into the question whether the first defendant had acquired title to the suit lands by prescription.

1. (1959) 2 An.W.R. 294 : A.I.R. 1960 A.P. 98.
2. (1944) 49 C.W.N. 37 : A.I.R. 1945 Cal. 268.
3. I.L.R. 1950 Mad. 191 : (1949) 2 M.L.J. 171 : A.I.R. 1949 Mad. 721.

7. The Second Appeal is, therefore, allowed with costs. No leave.

S.J. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*S. Mohan, J.*

G. Muthuvel Pillai .. *Appellant**

v.

Hazarath Syed Sha Mian Sakkab Kadhiri Thakal, Thanjavur by its Trustee and others .. *Respondents.*

Madras City Tenants Protection Act, (1921), (*III of* 1922), *section* 9 *and the Amending Acts* (*XIII of* 1960 *and XVI of* 1964)—*Extension of Act to Thanjavur—Compromise subsequent to* 1960 *but before 7th November,* 1964 *between landowner and tenant—Impact of section* 3 *of Amending Act of* 1964 *on the compromise and its execution.*

The Madras City Tenants Protection Act was extended to Thanjavur by a notification under G.O. No. 1345 with effect from 28th March, 1965. As a result of the same all benefits under the Act both with regard to residential and non-residential buildings were made available to the tenants. The Amending Act XIII of 1960 was passed with the object of withdrawing the protection to tenants of non-residential buildings as a result of which, the proceedings pending in Courts in respect of non-residential buildings were extinguished. That was the position till the Amending Act XVI of 1964 was enacted, whereby the original position was restored, the benefits of the act being extended to non-residential buildings also. The said Amending Act of 1964 was made applicable to Thanjavur by notification dated 2nd November, 1964. [*Para.* 11.]

A suit for recovery of possession of leased property on the expiry of the lease, after removing the superstructure raised thereon by the tenant, resulted in a compromise on 28th June, 1964 whereby the superstructure was to be purchased by the plaintiff at a price to be fixed by the Court. Execution was taken out on deposit of the price so fixed, for delivery of possession. The tenant claimed the benefits conferred by the Madras City Tenants Protection Act as amended in 1964 and contended that the execution petition had abated.

Held: The rights of the parties were concluded by their entering into a private treaty on 28th June, 1964 and the execution petition had not abated by virtue of section 3 of the Amending Act of 1964 since it was totally outside the scope of the Act. [*Para.* 15.]

Case referred to :—

Pattu Iyer v. *Arunachala Padayachi,* (1973) 1 M.L.J. 77.

Appeal against the order of the District Court, West Thanjavur in C.M.A. No. 118 of 1974 preferred against the order of the Court of District Munsif of Thanjavur in E.P. No. 933 of 1973 in O.S. No. 30 of 1962.

Govind Swaminathan for *M. Ramachandran*, for Appellant.

S. Kothandarama Nainar, for 1st Respondent.

The Court made the following

ORDER.—This case illustrates how very resourceful a judgment-debtor could be and ingenuously set at naught the valid orders of Court, including a compromise decree. Undaunted by the adverse judgments right from 1963, the judgment-debtor has been making repeated onslaughts under the umbrage of some technical plea or other and thereby has been preventing the decree-holder from realising the fruits of the decree.

The facts relating to the civil miscellaneous second appeal are as follows:

2. The first defendant in O.S. No. 30 of 1962 on the file of the District Munsif's Court of Thanjavur, and respondent in the Execution Petition, is the appellant. O.S. No. 30 of 1962 was a suit filed by the plaintiff, Hazarath Syed Sha Mian Sakkab Kadhiri Thakal, represented by its Trustee, for the recovery of the vacant possession from defen-

* A.A.O. No. 40 of 1975.

20th August, 1975.

dants 1 and 2, after removing the superstructure put up thereon. The case of the plaintiff was that the property was leased out in favour of defendants 1 and 2 (the second defendant being the mother of the first defendant) and they sublet the property in favour of the third defendant. Defendants 1 and 2 put up a superstructure and the lease period having expired, they have got to surrender vacant possession, after removing the superstructure. Since vacant possession was not so delivered, the necessity for the suit.

2-a. Pending the suit, I.A. No. 564 of 1963 was filed, whereby the parties entered into a compromise. The said compromise memorandum, dated 28th of June, 1963 *inter alia* stated as follows: (I am extracting the compromise memorandum since that is material for a decision in the present case):

> "1. The parties agree that a Commissioner may be appointed to make a local investigation of the suit property to assess the value at present of the superstructure that stands on the suit site and to report the same to this Hon'ble Court.
>
> 2. The parties further agree that on this Hon'ble Court enquiring into the Commissioner's report and fixing the price, the plaintiff is to buy the superstructure from defendants 1 and 2 at a price to be fixed by this Court after deducting rent due from them for the site till the time of purchase. Defendants 1 and 2 may receive the amount to be deposited after delivery of the possession."

3. On 6th of August, 1963, the learned District Munsif decreed the suit, whereunder the plaintiff was directed to purchase the suit building and to deposit the sale consideration of Rs. 6,000 on or before 6th of February, 1964. It may be relevant to note at this stage that O.P. No.20 of 1963 was filed by the second defendant, under section 9 of the Madras City Tenants (Protection) Act, 1921 (Tamil Nadu Act III of 1922), hereinafter referred to as the Act. But, that was rejected, on the ground that the suit site being non-residential in character, no benefit could be claimed under the Act, as it was then applicable to Thanjavur. Further, the application was beyond the period of limitation of one month.

4. On appeal, the sale consideration was increased to Rs. 10,000 by the lower appellate Court. But, when Second Appeal No. 1658 of 1964 was preferred, the following decree was passed on 5th November, 1968:

> "The parties agree that the appellant (plaintiff) may deposit Rs. 2,000 more, in addition to the sum of Rs. 6,000 he has already deposited within 2 months from this date and the respondent will give possession immediately on deposit. On failure to do so execution can be taken out immediately and proceedings taken. The respondents 1, 4 and 5 can withdraw the sum of Rs. 6,000 already deposited as well as Rs. 2,000 to be deposited only after giving possession. Out of this amount the rents upto date would naturally be deducted. The parties will bear their own costs".

The plaintiff, on the strength of this decree, preferred E.P. No. 31 of 1969. Delivery was ordered. Thereupon C.M.A. No. 116 of 1971 was preferred. That was also dismissed. As against the same, A.A.O. No. 90 of 1972 was filed before this Court and that too was dismissed by Gokulakrishnan, J.

5. At this stage, one important fact is to be stated. Pending C.M.A. No. 116 of 1971, the first defendant filed C.M.P. Nos. 12552 and 12553 of 1970 in S.A. No. 1658 of 1964 to clarify that the compromise would be binding only between the appellant (the mother) and the 5th respondent, inasmuch as the first respondent therein remained *ex parte*. Consequently, according to him, the terms of the decree in S.A. No. 1658 of 1964 should be confined only to the quantum of valuation. Later, an application was filed for staying all further proceeding in E.P. No. 31 of 1969. Ramamurthi, J., by his order dated 13th November, 1970 held:

> "There is no substance in the petitions. The petitioner did not care to parti-

cipate even though he was duly served in the second appeal both in his own capacity as the first respondent as well as in his capacity as the legal representative of his deceased mother. The judgment also indicates that the compromise was merely the acceptance of the suggestion of the Court in the course of the hearing, to the effect that the compensation amount might be fixed at Rs. 8,000. It is clear that the petitioner herein is taking advantage of the fact that in the preamble portion of the judgment there is some reference to the agreement between the parties. That apart, the petitioner who did not participate in all these proceedings, is not entitled to file this petition. It is clear that he has been set up by the other members of the family to rake up the question over again after having obtained an advantage of the amount being fixed at Rs. 8,000 by this Court (High Court)".

After all these proceedings, when E.P. No. 933 of 1973 was filed under Order 21, rule 35, Civil Procedure Code, for delivery of possession, the first defendant opposed delivery, contending, chiefly, that he was not a party to the compromise, dated 28th June, 1963. In any event, no rights would accrue in favour of the decree-holder after the passing of the Amending Act (Tamil Nadu Act XVI of 1964). In view of section 3 of the said Act, the proceedings by the plaintiff will have to abate and no rights remain for being enforced.

6. The learned Additional District Munsif of Thanjavur held:

"The dispute between the parties has been fully and finally set at rest in S.A. No. 1658 of 1964 and A.A.O. No. 90 of 1972. The High Court has also passed a decree in S.A. No. 1658 of 1964, finally determining the dispute. Therefore, the decree in S.A. No. 1658 of 1964 and the judgment in A.A.O. No. 90 of 1972 are binding upon the respondent in this petition. For all these reasons, I hold that Act XVI of 1964 is not applicable to the decree passed in this suit."

7. On appeal, in C.M.A. No. 118 of 1974, the learned District Judge confirmed the finding of the trial Court mainly on the ground of constructive *res judicata*. He further held that after the Amending Act of 1964 came into force and after the notification extending it to Thanjavur town, the appellant never claimed the benefits of the Act and was content to enter into a compromise. Therefore, he must be deemed to have waived the the benefits under the Act and elected to receive compensation for the superstructure.

8. Aggrieved by this judgment, the present civil miscellaneous second appeal has been preferred.

9. The learned Advocate-General appearing for the appellant, strenuously contends before me that the finding of the lower Appellate Court, and equally the Executing Court, are unsustainable in law. Having regard to the sweeping language of section 3 of the Amending Act, *viz.*, Tamil Nadu Act XVI of 1964, if the proceedings abate by the operation of legislation, so submits the learned Advocate-General, no question of constructive *res judicata* or waiver would arise. In support of the same, reliance is placed on the ruling in *Pattu Iyer v. Arunachala Padayachi*[1].

10. The simple, but effective, reply of Mr. Kothandarama Nainar, learned counsel for the decree-holder-respondent is that notwithstanding the reasonings of the Courts below, which may not be quite sound in law, the conclusion is unassailable, since the rights of the parties under the compromise were determined, as early as 28th of June, 1963 long before the Tamil Nadu Act XVI of 1964 came into force. That decree was merely for the purchase of the building on the suit site, in a suit for ejectment. Where, therefore, even before the Amending Act came into operation, the rights of the parties were finally determined, no further right remained under the Madras City Tenants (Protection) Act, 1921, in which event alone, section 3 of the Amending Act would apply and the

1. (1973) 1 M.L.J. 77.

proceedings taken out by the landlord will get abated.

11. In order to appreciate the respective contentions, the history relating to this legislation may briefly be noted. The Madras City Tenants (Protection) Act, was extended to Thanjavur by a notification under G.O. No. 1345, with effect from 28th of March, 1956. As a result of the same, all benefits under the Act, both with regard to residential and non-residential buildings were made available to the tenants. The Amending Act XIII of 1960 was passed with the object of withdrawing the protection to tenants of non-residential buildings, as a result of which, the proceedings pending in Courts in respect of non-residential buildings were extinguished. That was the position till the Amending Act XVI of 1964 was enacted, whereby the original position was restored, the benefits of the Act being extended to non-residential buildings also. The said Amending Act XVI of 1964 was made applicable to Thanjavur by G.O. No. 2622, dated 7th November, 1964. Section 3 of this Act states as follows:—

> "3. *Certain pending proceedings to abate.*—Every proceeding instituted by a landlord in respect of any non-residential building or part thereof situated in any municipal town specified in the notification issued under sub-clause (*i*) of clause (1) of section 2 of the principal Act, as amended by this Act and the villages within five miles of such municipal town and pending before any Court or other authority or officer on the date on which the said notification takes effect shall, in so far as the proceeding relates to any matter falling within the scope of the principal Act as amended by this Act in respect of such building or part, abate, and all rights and privileges which may have accrued to that landlord in respect of any such building or part and subsisting immediately before the date on which the notification aforesaid takes effect shall, in so far as such rights and privileges relate to any matter falling within the scope of the principal Act as amended by this Act, cease and determine and shall not be enforceable:
>
> Provided that nothing contained in this section shall affect any decree or order passed which has been executed or satisfied in full before the date on which the notification aforesaid takes effect."

It may be relevant to note, at this stage, that the compromise in this case was entered into on 28th of June, 1963. Under these circumstances, the only question that would arise is, whether the appellant can claim the benefit of section 3 of the Amending Act XVI of 1964, though such a plea was not put forth in any one of the prior proceedings.

12. At the outset, I am constrained to state that the reasoning of the learned District Munsif, a portion of which I have extracted above, that the rights of the parties were concluded by the two judgments of this Court in Second Appeal No. 1658 of 1964 and A.A.O. No. 90 of 1972 and hence Act XVI of 1964 is not applicable, is not correct. Equally, the reasoning of the learned District Judge that the principle of constructive *res judicata* would apply is also incorrect.

13. The learned Advocate-General is right only thus far, since, if the legislation intervenes and says all proceedings shall abate, it is well settled that the decree or order or any proceeding thereon will be unenforceable and will come to a close. It is the Courts which are disabled by the operation of the legislation. It does not depend upon whether such a contention was raised by the party or not. Equally, there cannot be any waiver by a party. The attention of the Court may be drawn to the said legislation and its disability to deal with the matter can be pointed out. It does not matter at what stage the proceedings stand. As a proposition of law, no exception could be taken to this argument of the learned Advocate-General. To the same effect is the decision in *Pattu Iyer* v. *Arunachala Padayachi*[1]. But,

1. (1973) 1 M.L.J. 77.

I am afraid that that decision has no application to the facts of the present case.

14. If at a time, when Amending Act XIII of 1960 was operating, the parties chose to enter into a compromise on 28th of June, 1964 whereby what was contemplated was a simple purchase of the superstructure at a price to be fixed by the Court, this compromise has nothing to do with the benefits conferred under the Act. What was agitated in Second Appeal was only about the quantum, which ultimately came to be fixed as seen above at Rs. 8,000. Thanks to the appellant, whatever doubts remained about the binding nature of the compromise, by filing C.M.P. Nos. 12552 and 12553 of 1970, the matter was clarified by Ramamurthi, J., by reason of which it is now clear that there is an effective compromise binding on the appellant. It is here, I have to state that the appellant himself was served both in his personal capacity and also as the legal representatives of his deceased mother, which fact also was noted by Ramamurthi, J., If it is a case of a simple purchase of the superstructure *de hors* the Act, it cannot be contended at all, that any rights still remained surviving under the Act concerning which proceedings are pending, which would abate under section 3 of the Amending Act XVI of 1964.

15. As seen above, the Amending Act XVI of 1964 itself was extended to Thanjavur only on 7th November, 1964. Even before that, the rights of the parties were concluded by their entering into a private treaty on 28th June, 1964. Where in execution of the said compromise, execution proceedings are taken for delivery of possession, it cannot be contended, by virtue of section 3 of the Amending Act XVI of 1964, the said proceedings will abate, since it is totally outside the scope of the Act.

16. It may be of interest to note that as seen from the above narration, O.P. No. 20 of 1963 filed by the Second defendant under section 9 of the main Act was dismissed. In such a case, no rights survive for the application of section 3 of the Amending Act. Therefore, I uphold the submission of Mr. Kothandarama Nainar, learned counsel for the respondent.

17. In the result, agreeing with the ultimate conclusion of the Courts below, but on a different reasoning, I hold that there are no merits in the Civil Miscellaneous Second Appeal. It will stand dismissed with costs. No leave.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

C. Somayya .. *Appellant**

v.

E. V. Chinniah Konar .. *Respondent.*

AND

V.R. Karuppiah .. *Appellant*

v.

E. V. Chinniah Konar and another .. *Respondents.*

Negotiable Instruments Act (*XXVI of* 1881), *section* 11—*Promissory note—Borrowing made in India—Execution of note, outside India—Parties residents of India though temporarily in Singapore—Affixture of Stamp according to India Act—Whether promissory note is enforceable as inland instrument.*

Section 11 of the Negotiable Instruments Act, lays down that if a promissory note is drawn upon any person resident in India it shall be deemed to be an inland instrument. The promissory note in the instant case evidenced that both the parties belonged to India and temporarily were in Singapore. That being so, this is an instrument drawn on a person resident in India and temporarily in Singapore, and is an inland instrument. [*Para.* 6.]

Case referred to :—

A. G. Kidston & Co., Ltd. v. *Seth Brothers*, (1930) I.L.R. 57 Cal. 730.

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*S.A. Nos. 443 and 594 of 1971. 3rd *March*, 1975.

Appeals against the decree dated 31st December, 1970 of the Court of the Subordinate Judge, Devakottai in Appeal Suit Nos. 2 and 1 of 1970, preferred against the decree of the Court of the District Munsif of Devakottai in Original Suit Nos. 142 and 141 of 1969.

T. R. Mani, for Appellant.

K. Gopalachari, for Respondent.

The Court delivered the following

JUDGMENT.—Aggrieved by the decree passed by the Courts below in the suit on a promissory note, Exhibit A-1, the defendant has come up by way of Second Appeal.

2. The allegations in the plaint are that the defendant is a permanent resident of Thevarambur, Ramnad District. He borrowed a sum of Rs. 2,600 upon a promissory note from one Rama Konar of Pillamangalam Village for meeting his family and agricultural expenses while he and the said Rama Konar were in India. Subsequently, he went to Singapore and Rama Konar also went there. In Singapore the defendant executed a promissory note on 22nd October, 1962 affixing Indian stamp and agreeing to repay the said sum with interest at 6 per cent. per annum. In spite of repeated demands, the said amount remained unpaid. Rama Konar having assigned the promissory note to the plaintiff on 1st August, 1964 the present suit has come to be filed.

3. In the written statement, the defendant denied the borrowing and the executing of the promissory note in Singapore. His case was that in 1958 itself he left India for Singapore and since then, he had been residing continuously and the amount that was borrowed was in Singapore dollars. It was agreed that the money should be repaid in Singapore. Until May, 1964 interest was regularly paid to Rama Konar every month. The further contention of the defendant was since the plaintiff had not complied with the provisions of the Money Lenders' Ordinance, Singapore, the suit had to fail.

4. The learned District Munsif held that the suit promissory note did not come under the provisions of Singapore Money Lenders Ordinance and the partial failure of consideration and the discharge pleaded by the defendant were (not) true and thus decreed the suit. On appeal, the learned Subordinate Judge accepted those findings.

5. Mr. T. R. Mani, the learned counsel for the defendant draws my attention to the decision of Alagiriswami, J., as he then was, in A.A.O. Nos. 48 and 49 of 1968, wherein the learned judge held: "the instrument was endorsed in favour of the respondent in these two cases in Singapore.............. In this case we are not concerned, with costs of transfer in India." On this basis, the learned Judge rejected the argument advanced on behalf of the appellant about the nature of the instrument and after the dismissal of this appeal against appellate order, when the matter went back to the Court below, since they were bound by the judgment of the High Court, the question whether the instrument was a foreign instrument or an "inland instrument" and the applicability of section 19 of the Indian Stamp Act was not available to him and consequently, it had caused serious prejudice.

6. Mr. K. Gopalachari, the learned counsel for the respondent, in meeting this contention, submits that, no doubt, the two findings of Alagiriswami, J., extracted above, are not factually correct. But if a look at the suit promissory note is made it will clearly go to show that it is only an "inland instrument" within the meaning of section 11 of the Negotiable Instruments Act. The preamble of the promissory note recites that both the parties are only temporarily residing in Singapore. The Tamil portion, for proper appreciation, is as follows :

"சுபகிருது வருடம் ஐப்பசி மாதம் 6-ந்தேதி, இ. 22-10-62 திருச்சி ஜில்லா திருமயம்தாலுகா, பில்லமங்கத்திலிருந்து தற்சமயம் சிங்கப்பூர் 116 உறில் ஸைசயிடு டிரைவிலிருக்கும் ராம. ராமக்கோனார் அவர்களுக்கு, இராமநாதபுரம் ஜில்லா, திருப்பத்தூர் தாலுகா, தேவரம்பூரிலிருந்து தற்சமயம் சிங்கப்பூர் 116 உறில் ஸைசயிடு டிரைவிலிருக்கும் சி.

சோமய்யா எழுதிக் கொடுத்த பிராமஸ்ஸரி நோட்,.........''

Section 11 clearly lays down that if a promissory note is drawn upon any person resident in India, it shall be deemed to be an "inland instrument." The decision in *A. G. Kidston & Co.,Ltd.* v. *Seth Brothers*[1], is also relied on for this submission. I think that the learned counsel for the respondent is correct in his submission. The promissory note, undoubtedly, recites that both parties belong to India and temporarily are in Singapore. That being so, this is an instrument drawn on a person resident in India and it is an inland instrument. So, whatever incorrect statements are found in the judgment of Alagiriswami, J., cannot, in any manner, prejudice the case of the appellant since I come to the conclusion that this an "inland instrument" and the decision quoted above, *viz.*, *A. G. Kidston & Co., Ltd.* v. *Seth Brothers*[1], fully supports the respondent.

7. The next submission of Mr. T. R. Mani, is that the suit promissory note offends section 3 of the Money Lenders Ordinance of Singapore. The Courts below have found that only in these two cases, the plaintiff had advanced the amounts and therefore, he could be considered to be a money lender within the meaning of section 3 of that Ordinance and that presumption being rebuttable, the evidence of P.W. 3 that her husband is a Municipal employee on daily wages at Singapore and not a money lender has been accepted. I am in entire agreement with this finding. In this view, I find that the suit promissory note does not, in any way, offend section 3 of the said Ordinance.

8. The next contention is that the borrowing was only in Singapore dollars and that the money was not paid in India and the evidence that was let in concerning this issue was that the money was received by the mother of the defendant. Whatever may be the oral evidence concerning this, the document clearly recites that the money was advanced in India and the recitals of the plaint,in paragraph 3, also make it clear that the amount was received in India for agricultural expenses. So, this contention also fails. Thus, I find that there are no merits in this Second Appeal and I dismiss the same.

No costs : no leave.

9. The Second Appeal No. 594 of 1971 coming on for hearing on this day having been posted for clarification, the Court delivered the following Judgment (in this S.A. No. 594 of 1971).

10. The matter has been brought up before me having been put down for clarification. In view of finding in S.A. No. 453 of 1971, this second appeal will also stand dismissed.

No costs.

R.S. *Appal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*T. Ramaprasada Rao, J.*

N. V. Panchapakesan .. *Petitioner**

v.

K. Swaminathan .. *Respondent.*

Tamil Nadu City Tenants Protection Act (III of 1922), section 9 (1)—Suit for eviction—Appication under section 9 by tenant—Tenant's right recognized by trial Court—Relevant date for fixation of price.

The relevant date for fixation of the price (under the Tamil Nadu City Tenants Protection Act) would reasonably be the date on which the tenant's entitlement to compensation is first recognised by a competent Court which hears the matter and decides on it. [*Para.* 5.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the 1st Additional City Civil Court, Madras dated 29th December, 1973 and made in A.S. No. 230 of 1972 in O.S. No. 1382 of 1962, on the file of the IV Assistant Judge City Civil Court, Madras.

1. (1930) I.L.R. 57 Cal. 730.

* C.R.P. No. 2954 of 1974. *6th August*, 1975.

K. N. Balasubramanian, for Petitioner.

S. Parthasarathy, for Respondent.

The Court delivered the following

JUDGMENT.—As against the judgment and decree of the City Civil Court in A.S. No. 230 of 1972 the present revision petition has been filed by the landlord. The suit property said to be measuring about 48′ × 7″ on the road side and about 49′ in depth situate in No. 12, Doraiswami Road, T. Nagar, was leased out by the petitioner to the respondent as a vacant site. In the course of occupation the respondent who took the premises for conducting firewood business put up sheds thereon. In 1962 the petitioner filed a suit for eviction and the respondent in turn filed an application under section 9 of the Tamil Nadu City Tenants Protection Act, claiming benefits thereunder. There was a controversy as to whether the tenant was entitled to such benefits. Finally in C.R.P. No. 1887 of 1965 disposed of by this Court on 11th February, 1971 the right of the tenant to secure the benefits under the Tamil Nadu City Tenants Protection Act, were affirmed. Thereafter, I.A. No. 12272 of 1971 was filed for the fixation of the extent of the convenient land to which the tenant would be entitled to as one who is entitled to the benefits under the above Act and for the fixation of the price of such land to be taken over by the tenant. The first Court fixed that the price of the land, whatever extent has to be given over by the landlord to the tenant or taken over by the tenant from the landlord under the Act, has to be fixed as on 24th March, 1965 which was the date on which the rights of the respondent under the Tamil Nadu City Tenants Protection Act, was first recognised by the civil Court. In accordance with the hypothesis so fixed the trial Court fixed the value of the property at Rs. 10,000 per ground, though the claim of the landlord was at Rs.18,000 per ground with reference to the date as above and held that the tenant would be entitled to an extent of 2381 sq. feet out of the totality of the land demised to him as such an extent would be absolutely necessary for the convenient enjoyment of the tenement and the land demised earlier by the landlord to the tenant. The appellate Court confirmed the order of the trial Court in all respects. It is as against this the present revision petition has been filed.

2. The revision is under section 115 of the Civil Procedure Code, obviously on the foot that the appellate Court is a Court subordinate to this Court and its orders are revisable by this Court under section 115 of the Civil Procedure Code. Bearing in mind the limits under which this Court could interfere with the orders or judgments of the Courts below under section 115, Civil Procedure Code, the matter was heard.

3. Mr. K. N. Balasubramanian, learned counsel for the petitioner urged two contentions basing his arguments on the language of section 9 of the Tamil Nadu City Tenants Protection Act. According to him the price to which such land which on due investigation under the provisions of the Act should be allotted to the tenant should be fixed as on the date when the application for appointment of a Commissioner to evaluate the property was fixed *viz.*, about April, 1971 and not on the date when the entitlement of the tenant to get the land or such convenient portion thereof at a price to be fixed by the Court has been found in favour of the tenant. Secondly, the contention is that under the guise of allotment of such land which may be necessary for the convenient enjoyment of the tenant, the Courts ought not to allot the entirety or a major portion of the demised land to the prejudice of the landlord.

4. Mr. Sundaram Iyer, contending contra would say that the price which has to be fixed by the Court for the minimum extent of land which has to be statutorily allotted to the tenant under the provisions of the Act should have a relation to the judgment and decree of the Court in and by which the tenants' right to secure such land has been affirmed and if any other date were to be taken into consideration then the process of assessment would become ambulatory in character. As regards the second contention learned counsel would rely upon the report of the Commissioner

who on an inspection of the site came to the conclusion that an extent of 2,381 square feet out of the total demised land would be necessary for the convenient enjoyment of the tenement by the tenant.

5. Regarding the first contention section 9 (1) of the Tamil Nadu City Tenants Protection Act says that "any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted—shall within the time prescribed apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court the whole or part of the extent of the land specified in the application." It is common ground that the tenant having regard to the nature of this business requested that the entire extent of land demised to him may be allotted to him and the price fixed therefor. It is significant to note that when the landlord filed O.S. No. 1382 of 1962 seeking for ejectment of the tenant from the leased land and in spite of the defences raised and in particular the request of the tenant for the recognition of his rights under section 9 of the Tamil Nadu City Tenants Protection Act it was denied to him as early as 28th September, 1964. It was only the appellate Court on appeal by the tenant *in re* his statutory rights under the Act that confirmed the affirmed the rights of the tenant and conferred on him the benefits arising out of the beneficial provisions of the Act. This was on 24th March, 1965. For the first time, therefore, the entitlement of the tenant to claim the benefits under the Act was given a judicial recognition only on 24th March, 1965. It is this specificity in the event that is pressed into service by Mr. Sundaram Iyer when he says that it is only that date, when the rights of the tenants under the Act are affirmed which enters into the computation for purposes of fixing the price of the land to which the tenant would be entitled in accordance with the provisions of the Act and that date alone has to be taken in account. If the argument of Mr. Balasubramanian is accepted it would be difficult to find any other alternative specific date for the ascertainment of such price. It may be that appeals or other proceedings before the higher hierarchy may be filed by the landlord opposing the conferment of such a statutory benefit on the tenant and the appellate Court or the Court of revision might take some time before deciding whether the tenant is entitled to such benefits or not. In the instant case the C.R.P. No. 1887 of 1965 filed by the landlord against the order of the appellate Court which recognised the right of the tenant to the benefits of the Act was disposed of only in 1971. Could it therefore be said that the price of the land to which the tenant would ordinarily be entitled to under the Act should be fixed as on the date when the High Court in exercise of its revisional powers disposed of the revision petition filed by the landlord? Can it also be said that after such final disposal of the matter by the High Court, if the tenant files an application for processing further the effect of the earlier orders whereunder he secured the benefit under the Act, it is the date on which he filed such an application for the ascertainment of the quantun of the land to be allotted to him or for the fixation of the price of land to be so allotted, is the date on which the price of the land has to be fixed? Many hypothetical reasons or options considerations might arise if the argument of Mr. Balasubramanian is accepted. There may be occasions when litigants might go to the Supreme Court as well. The order passed by the High Court in a revision petition can under certain circumstances by taken up further to the Supreme Court. Should the tenant therefore await the decision of the Supreme Court and take it for granted that it is only when the Supreme Court agrees with the Courts below that his entitlement to purchase the land has become fruitioned and complete in the eye of law and that such land to be taken over by him should be valued only on that date. Such ambulatory and indefinite methods of fixation of price of land to be allotted to a tenant in view of his entitlement under the provisions of the Act has to be necessarily avoided if a definite date is available for such fixation. Such a date for fixation of the price, in my view, would reasonably be the date on which the tenants'

entitlement to compensation is first recognised by a competent Court which hears the matter and decides on it. Of course, if at any time another competent Court in the higher hierarchy sets aside the directive for the Courts below that the tenant is not entitled to such an entitlement, then the matter is closed. But if the judgments of the higher Courts are judgments of affirmance then such orders or judgments obviously relate back to the date of the order of the first competent Court which decided on the entitlement of the tenant under the Act. As a specific, definite and unambiguous date is available for valuation of the land to be purchased by the tenant pursuant to his entitlement under the Act, I am of the view that the date for fixation of such price should relate back to the date when the Court, in the first instance, recognises and confers such a right on the tenant and cannot be relegated to any other uncertain, ambulatory and ambiguous dates.

6. As regards the extent of the land both the counsel placed before me two sketches. The words deployed by section 9 (1) (*b*) of the Act is that "On such an application the Court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment of the tenant and thereafter fix the price of the minimum extent of the land decided as aforesaid". The Commissioner, no doubt, expressed the view that almost the entire extent of the land is necessary for the convenient enjoyment by the tenant. In spite of the fact that the Tamil Nadu City Tenants Protection Act is a beneficial legislation which would entitle the tenant to get for himself at a reasonable price in accordance with the prescriptions in the Act such portion of the demised land which is necessary for the convenient enjoyment, yet it cannot be expected unreasonably that the Act intended that whatever the tenant pleads as the extent of the land required for his convenient enjoyment it should be allotted to him. The respondent is carrying on firewood business in the land which is roughly of an extent of one ground. Taking into consideration the fact that the superstructure which is abutting the road plus some land appurtenant thereto in the south would be sufficient for his convenient enjoyment of the tenant as a whole, I fix the extent of the land, which has to be surrendered by the landlord to the tenant and sold by him in accordance with law, as the land of an extent of 48′ on the road side and the north to south depth of such land would be upto the limit of the bathrood, shown in the sketch and a line from east to west in continuation thereof. As a rough indication thereto the sketch which is made part of this record shall indicate as to what extent of the demised land would be deemed to be necessary for the convenient enjoyment by the tenant. This extent shall be sold by the petitioner to the tenant at the price fixed by the Court below. The revision is allowed in part. There will be no order as to costs.

S.J. ——— *Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C. J. and S. Natarajan, J.*

Subramania Pillai .. *Appellant**

v.

Masterly .. *Respondent.*

Mortgage—Prior usufructuary mortgage and subsequent simple mortgage—Second mortgage enforced through Court—Death of mortgagor before execution—A legal representative brought on record in execution proceedings—Sale in favour of the assignee decree-holder—Suit for redemption of usufructuary mortgage by purchaser of equity of redemption from heirs of original mortgagor—Question of substantial representation in execution proceedings.

All that is necessary to see is whether in the execution sale proceedings there was proper representation by the judgment-debtor or his legal representatives. It is not always a legal requisite that inevitably, only the heirs—all of them or any of them—of the judgment-debtor, should figure as legal representatives. The procedural law requiring representation will stand satis-

* L.P.A. No. 29 of 1973 and Memo. of objection. 24th September, 1975.

fied if there is substantial representation in the sense that all that could be done in defence was done by some one interested in the issue in the suit. [*Para.* 3.]

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Raghavan, dated 28th November, 1972 made in S.A.No. 1094 of 1968 preferred to the High Court against the decree of the Court of the Subordinate Judge, Nagercoil, made in A.S. No. 266 of 1966 (O.S. No. 51 of 1965, Principal District Munsif Court, Padmanabhapuram).

S. Padmanabhan, for Appellant.

P. Ananthakrishnan Nair, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, CJ.—This appeal under the Letters Patent by the plaintiff turns on whether there was a substantial representation in the Court proceedings resulting in a sale in execution of a mortgage decree obtained against Chempakaraman Pillai. For the purpose of this Appeal, it is enough to say that the property in question was subject to a usufructuary mortgage executed on 9-4-1100 M.E., and this was followed by a simple mortgage executed by the owner on 3-10-1101 M.E. The second mortgage was enforced through Court, but, before the decree was executed, the mortgagor had died. One Lakshmi was impleaded as his legal representative in the execution proceedings. Eventually, there was a sale in favour of the assignee-decree holder, who got a sale certificate for himself. The present appeal arises out of a suit for redemption of the usufructuary mortgage brought by the purchaser of the equity of redemption from the heirs of the original mortgagor. Raghavan, J., who heard the second appeal arising out of the suit, allowed it and dismissed the suit on the ground that the appellant no longer owned the equity of redemption. He was of opinion that Lakshmi, as a legal representative, substantially represented the widow or widows of Chempakaraman Pillai and that therefore the Court sale was good. But he granted leave.

2. We are of the same opinion. A perusal of the finding, which Raghavan, J., called for and looked into, convinces us that the inclination of the finding Judge was to hold Lakshmi not to be a stranger, but closely associated with the family of Champakaraman Pillai. This inclination is to be found from the circumstances that Lakshmi's address was given as the house of late Chempakaraman where his widow or widows lived. Lakshmi was the widow of his brother. Even the evidence on the appellant's side accepted a custom in the community permitting a brother to remarry his brother's widow. But when the evidence was sought to be made clear as to the existence of the widows of Chempakaraman Pillai, the deponent for the appellant stated that he forget the name of the widows, though Chempakaraman Pillai was his relation and he himself performed his obsequies. On these circumstances, the Subordinate Judge who rendered the finding was inclined to think that she was closely, as we said, bound up in relationship with Chempakaraman Pillai. But he stopped short of finding the exact relationship. That we can appreciate and he was not called upon to state conclusively in the context.

3. All that is necessary to see is whether in the execution sale proceedings there was proper representation by the judgment-debtor or his legal representatives. It is not always a legal requisite that, inevitably, only the heirs, all of them or any of them, should figure as legal representatives. The procedural law requiring representation will stand satisfied if there is substantial representation in the sense that all that could be done in defence was done by someone interested in the issue in the suit. Lakshmi in obedience to the summons entered appearance through an advocate and took time. That shows that she participated in the sale proceedings. Raghavan, J., accepted the finding of the Subordinate Judge that Lakshmi substantially represented the widow or widows of Chempakaraman Pillai who were his heirs. That being so we hardly find any cogent reason to differ from the view of Raghavan, J.

4. The appeal is dismissed. No costs. The cross-objections are not pressed. Dismissed. No costs.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

A. G. S. Moorthy .. *Petitioner**

v.

Mrs. S. Satyanathan .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14—Petition for eviction—Demolition and reconstruction—Plan filed—Failure of landlady to name the engineer—No lack of bona fides—*Eviction ordered.*

A landlady filed an application under section 14 of Act XVIII of 1960. She also filed the plan. Before the Rent Controller, she could not name the engineer who prepared the plan and the petition was dismissed. However, on appeal, she succeeded. The tenant filed a revision petition alleging lack of *bona fides* on the part of the landlady.

Held: Merely because the landlady was not in a position to name the engineer who had prepared either the plan or the report, that did not mean that there was any lack of *bona fides* on her part. [*Para.* 3.]

Cases referred to :—

Neta Ram v. *Jiwan Lal*, (1962) 2 S.C.J. 270 : (1962) 2 S.C.R. (Supp.) 623 : A.I.R. 1963 S.C. 499; *Selvaraj* v. *Narasimha Rao*, (1969) 1 M.L.J. 587.

Petition under section 25 of the Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of Small Causes 3rd Judge, Madras, dated 28th August, 1975 and made in H.R.A. No. 80 of 1975 (against) H.R.C. No. 511 of 1973, dated 20th November, 1974 on the file of the 6th Judge, Court of Small Causes, Madras.

C. Lakshminarayanan, for Petitioner.

B. Ram Mohan, for Respondent.

The Court delivered the following

JUDGMENT.—This revision arises under the Tamil Nadu Buildings (Lease and Rent Control) Act consequent to the allowing of the application under section 14 of the said Act by the appellate authority. The tenant is the revision petitioner. The Rent Controller found that there was lack of *bona fides*, because the landlady, P.W. 1, was not in a position to name the Engineer who prepared Exhibits P-2 and P-3 and also Exhibit P-1 plan. It was further found that she did not have the wherewithal notwithstanding Exhibit P-4 and P-5. Consequently, he dismissed her application. Aggrieved by the same, an appeal was preferred. The appellate authority reversed the findings and ordered eviction. In so doing, he held that the evidence should not be examined in microscopic detail, nor again the prior proceedings which exhibited some animosity between the landlady and the tenant would be of any relevance.

2. Mr. N. Sivamani, learned counsel appearing for the revision petitioner, strenuously urges before me that this is a case in which there is absolute lack of *bona fides* within the meaning of section 14 (1) (*b*). The appellate authority has taken a light-hearted view and has made out a case for the landlady since all that was stated in paragraph 4 of her petition was a vague allegation that she *bona fides* required the building without any detail whatsoever. Those details were sought to be supplied only by oral evidence as a result of which the tenant was taken by surprise. This apart, Exhibit P-2 and P-3 have not been legally proved. More than this, Exhibit P-4 and P-5 do not show that actually the landlady is in a position to secure the necessary funds for the purpose of re-construction. In support of these submissions, the learned counsel relies on *Neta Ram* v. *Jiwan Lal*[1], and *Selvaraj* v. *Narasimha Rao*[2].

3. The learned counsel for the respondent would urge that the appellate authority, on an examination of all the relevant circumstances including the preparation made for the re-construction and also the attempts to secure the necessary finances, has come to the proper conclusion and therefore, no exception could be taken to its order of eviction.

* C.R.P. No. 2811 of 1975. *9th December*, 1975.

1. (1962) 2 S.C.J. 270: (1962) 2 S.C.R. (Supp.) 623: A.I.R. 1963 S.C. 499.
2. (1969) 1 M.L.J. 587.

In matters like this, as Ramaprasada Rao, J., pointed out in *Selvaraj* v. *Narasimha Rao*,[1] the test is :

> " In an application under section 14 (1) (*b*), there is no scope for such bifurcation of *bona fides* and compartmentalisation thereof. .... Once it is found that the landlord has satisfied all other relevant considerations which might arise under section 14 (1) (*b*) of the Act, and his claim is found to be honest and not designed and not for an ingenuous purpose, then no option is left to the Court except to direct eviction of the tenant. This is so, because the landlord is always under the grave risk of facing a claim for repossession of the building or part thereof whenever he fails in his undertaking as contemplated in sub-section (2) of section 14 resulting in the tenant securing the redelivery of the building or part thereof secured by the landlord pursuant to the orders passed by the Controller under section 14 (1) (*b*). This safeguard acts as a pivot to tilt matters one way or the other and in effect a microscopic scrutiny into the subjective content of the expression '*bona fide*' appearing under section 14 (1) (*b*) becomes absolutely unnecessary."

Applying the same test, I am unable to see any dishonest motive or design in the instant case. Merely because the landlady is not in a position to name the Engineer who had prepared either the plan or the report, Exhibit P-2 and P-3, that does not mean that there is any lack of *bona fide*. Exhibits P-4 and P-5 clearly show the necessary steps taken in regard to procuring the finances. Added to this, the landlady has stated in her oral evidence that her husband is having a clinic in a portion of the said premises and her son, who was a House Surgeon at the time of the enquiry of the Rent Control Petition, has become a Doctor and these factors make her requirement *bona fide*. Unfortunately, the Rent Controller has made much of certain small discrepancies in her evidence which, the appellate authority has pointed out, do not be little her claim for demolition and reconstruction. In this view, I am unable to see any merit in the revision petition.

4. Mr. N. Sivamani, learned counsel, would submit that the tenant is running a workshop and in the normal course, this revision would have taken some more time to reach final disposal and therefore, at least six months' time may be granted to him while the learned counsel for the respondent would suggest a period of three months. Taking both into consideration, I direct the tenant to vacate the premises forming the subject-matter of the revision petition on or before 31st March, 1976. With this observation, this revision petition is dismissed. However, there will be no order as to costs.

S.J. *Petition dismissed.*

1. (1969) 1 M.L.J. 587 at 590.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami, C.J.* and *S. Suryamurthy, J.*

Muniyandi .. *Appellant**

v.

Rajangam Iyer .. *Respondent.*

Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (X of 1969), section 16-A—Correction of record—Jurisdiction of civil Court—Whether barred by the Act.

Section 16-A of Act X of 1969 admits of no doubt that a civil Court has no jurisdiction to decide any matter which the Record Officer, District Collector, or other officer or authority empowered by or under the Act should determine. The Court is also forbidden from granting injunction in respect of any action taken or to be taken by such officer or other authority in pursuance of any power conferred by or under the Act. The Act indicates and provides for the remedy to correct the record by following the procedure laid down. Until the contrary is proved or a new entry is lawfully substituted therefor, the entry shall be presumed to be correct. [*Para.* 6.]

* A.A.O. No. 213 of 1975. *21st January,* 1976

Appeal against the order of the Court of the Subordinate Judge, Thanjavur, dated 11th February, 1975 and made in A.S. No. 86 of 1974 (O.S. No. 547 of 1971) District Munsif Court, Thiruvaiyaru).

U. Somasundaram, for Appellant.

K. Sarvabhauman, for Respondent.

T. N. C. Srinivasavaradachari representing the Bar Association.

T. L. Ram Mohan, representing the Advocates Association.

The Court (*N. S. Ramaswami, J.*,) made the following

ORDER.—The appellant before me challenges an order of remand. The appellant claims that he is a cultivating tenant entitled to the protection of Act XXV of 1955. The first appellate Court which remanded the suit for fresh trial has directed the trial Court to go into this question and give its finding. The contention on behalf of the appellant is that in view of the provisions contained in the Tamil Nadu Act X of 1969, the civil Court has no jurisdiction to go into the question whether a particular party is a cultivating tenant or not and that that question can be decided only by the hierarchy of officers appointed under the abovesaid Act. It is also contended that the Record Officer under the said Act has already entered the appellant as a cultivating tenant in the record concerned, that that order has been confirmed even by the revisional authority under the said Act and that therefore, the civil Court has to accept the position that the appellant is a cultivating tenant.

2. On behalf of the respondent-landlord, the contention is that under the provisions of the said Act, the Record Officer is only to prepare a register giving the name or names of the cultivating tenants, that there is no specific provision in the said Act authorising anyone to decide the question whether a particular party is or is not a cultivating tenant and that, therefore, the civil Court's jurisdiction to entertain such a question is not ousted. It is also pointed out that under section 15 of the said Act, only a presumption arises regarding the correctness of the entry made by the Record Officer, that such presumption is a rebuttable one and that the said section itself contemplates an aggrieved party proving the contrary (in some other forum).

3. The question as to how far the provisions of Act X of 1969 oust the jurisdiction of the civil Court to decide the question whether a particular party is a cultivating tenant or not, is an important one which would arise in several litigations. In view of the importance of the question, I gave notice to the Advocates' Association as well as the Bar Association and counsel represent the said two Associations also. It is agreed by all the counsel before me that there is no decision of this Court so far regarding the above question of ouster of jurisdiction of the civil Court by the provisions of the Act. Considering the importance of the question, I think it would be better if the same is decided by a Division Bench, so that there would be an authoritative pronouncement for the guidance of the Courts below. Accordingly, the Civil Miscellaneous Appeal is referred to be decided by a Division Bench.

U. Somasundaram, Advocate, for Appellant.

K. Sarvabhauman, Advocate, for Respondent.

V. Manivannan, the Assistant Government Pleader II for the Government Pleader.

M. R. Narayanaswamy, the Secretary, Advocates Association.

T. N. C. Srinivasavaradachari, the Secretary, Bar Association.

The Judgment of the Court was delivered by

Veeraswami, CJ.—The question in this case is whether the civil Court has jurisdiction to decide whether a particular person is a cultivating tenant or not under Madras Act X of 1969. A suit was instituted for deciding that question, which was dismissed on the ground that section 16-A barred the civil Court's jurisdiction to decide that matter. But an appeal against that order succeeded with a direction that the matter should be disposed of afresh. The present appeal is against the order of remand by the lower appellate Court. When the matter came

before N. S. Ramaswami, J., in the first instance, he felt that the question as to how far the provisions of Madras Act X of 1969 oust the jurisdiction of the civil Court to decide the question whether a particular party is a cultivating tenant or not, was an important one which would arise in several litigations. On that view, he gave notice to the Advocates' Association, and Bar Association and desired that the matter should be decided by a Division Bench, and that is how it comes before us. Madras Act X of 1969 provides for the preparation and maintenance of record of tenancy rights in respect of agricultural lands in the State of Tamil Nadu. While the Act extends to the whole State, it has a definition section. A tenant in relation to any land, to which the Madras Cultivating Tenants Protection Act, 1955, applies, means a cultivating tenant as defined in clause (*aa*) of section 2 of that Act. The inclusive part of the definition takes in certain other tenures as well, with which we are not concerned at the moment. We have then the provision for preparation of record of tenancy rights. That is done by the Government by a notification directing the preparation of a record of tenancy rights for any specified village. Such record shall be prepared, maintained and revised in accordance with the provisions of the Act and the rules made thereunder. That record should contain the survey number or sub-division number, extent and local name, if any, of the land, the name and address of the landowner, the name and address of the intermediary, if any, the name and address of the tenant cultivating the land and such other particulars as may be prescribed. Then a procedure is prescribed for modification of this record. Where, subsequent to the publication of the approved record of tenancy rights, any land has been let for cultivation, the landowner, intermediary or the tenant having interest in such land shall make an application to the record officer for inclusion of particulars relating to such land in the approved record of tenancy rights, and may have the land included in the approved record of tenancy. If any modification in the record of tenancy rights is required of entries mentioned in section 5, that is permitted by following the procedure provided therein. Against orders under sub-section (8) of section 3, sub-section (3) of section 4 or sub-section (3) of section 5 appeals are provided with a period of limitation fixed for filing. A further remedy by way of revision also is provided. These are to be found in sections 6 and 7 of the Act. A further provision is made by section 8 for amendment of approved record of tenancy rights to give effect to the orders under section 6 or section 7. There are then the provisions providing for obligation to furnish information, penalty for failure to furnish information as also for furnishing false information. Section 13 provides for certain cognizable offences. Section 15 lays down a rule of presumption, which says that any entry in the approved record of tenancy rights shall be presumed to be true and correct until the contrary is proved or a new entry is lawfully substituted therefor. As the Act stood originally before Act XXXIV of 1972, there was no specific bar of the civil Court's jurisdiction to decide any matter which the Record Officer or the District Collector or other officer or authority empowered by or under the Act has to decide. We need not stop to consider whether, having regard to the scheme of the Act indicating matters to be decided, the officers who have the authority to decide and further remedies by way of appeal and revision the civil Court's jurisdiction, by necessary implication, would stand excluded in respect of matters which those officers have to decide.

6. But section 16-A, introduced by Tamil Nadu Act XXXIV of 1972, introduces such a bar, which reads :

> "16-A. *Bar of jurisdiction of civil Courts.*—No civil Court shall have jurisdiction in respect of any matter which the Record Officer, the District Collector or other officer or authority empowered by or under this Act has to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken by such officer or authority in pursuance of any power conferred by or under this Act."

The section admits of no doubt that a civil Court has no jurisdiction to decide any matter which the Record Officer,

District Collector or other officer or authority empowered by or under the Act should determine. The Court is also forbidden from granting injunction in respect of any action taken or to be taken by such officer or authority in pursuance of any power conferred by or under the Act. We are told that what led N. S. Ramaswami, J., to make the reference to a Division Bench was a consideration of the latter part of section 15. Apparently he thought if an entry in the approved record of tenancy rights should be presumed to be true and correct until the contrary was proved or a new entry was lawfully substituted therefor, to that extent the civil Court's jurisdiction should not be taken to have been excluded. In other words, evidently his impression was that a certain area of civil Court's jurisdiction was still available and the ambit of section 16-A should be read accordingly. We are of opinion that section 15 is not jurisdiction section. It only provides for a rule of evidence, namely, presumption of correctness of entries in the approved record of tenancy rights. This presumption cannot, of course, be rebutted until the contrary is proved or a new entry is lawfully substituted therefor. The words " until the contrary is proved " and the words " or a new entry is lawfully substituted therefor " are to be read with reference to the provisions of the Act. This is not indicative of an area of jurisdiction still left with the Court to decide any matter which is entirely within the jurisdiction of the officers who are empowered by or under the Act to decide. As a matter of fact, section 5, as we have already indicated, provides for modification of entries in the approved record of tenancy rights and if a decision of the Record Officer is taken up in appeal and a direction is given for modification, section 8 provides for amendment to be made in the record of tenancy rights according to the appellate decision. Same thing applies also to a revision order. The Act, therefore, indicates and provides for the remedy to correct the record by following the procedure laid down. Until the contrary is proved or a new entry is lawfully substituted therefor, the entry shall be presumed to be correct. It is perfectly clear and has nothing to do with the question of jurisdiction.

7. The language of section 16-A, as indicated by us, admits of no doubt that the civil Court's jurisdiction is expressly excluded in respect of any matter which the Record Officer, District Collector or other officer empowered by or under the Act has to determine.

8. The order of the Munsif in this case dismissing the suit is restored and the appeal is allowed. No costs.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *S. Mohan, J.*

Champalal Sowcar .. *Petitioner**

v.

A. V. Rajaloo and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960)—Application for exemption by landlady granted—Suit for possession—Landlady's death pending suit —Application for bringing on record the legal representatives —Objection by tenant—Cause of action if survives to the legal representatives.

Where in applying for exemption a landlady had put forward the case that she purchased the premises in question solely with the idea of making it available for occupation of her daughters and grandchildren who were studying in a school, very near to the premises but was unable to do so since the tenant had refused to vacate and that she had no remedy under the provisions of the Act to evict him, and the operative portion of the order granting exemption also stated : " If the exemption applied for by the landlady is not granted her daughters may have to continue to live in cramped quarters and her grandchildren put to the difficulty of going to the school at Santhome, Mylapore from Royapettah ",

Held : Apart from there being nothing to suggest that the exemption was personal

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*C.R.P. No. 3342 of 1975. *21st January,* 1976.

to the grantee, the operative portion of the exemption order clearly showed that throughout the stress was to house the married daughters and grandchildren. Therefore the exemption cannot be held to be personal to the grantee. The objections to the legal representatives of the landlady being brought on record in the suit that had been instituted by her for recovery of possession were liable to be dismissed. [*Para.* 3.]

Cases referred to :—

Phool Rani v. *Naubat Rai*, (1973) 2 S.C.J. 589 : (1973) 3 S.C.R. 679 : A.I.R. 1973 S.C. 2110 ; *Hajee Abdulla Sait* v. *K. D. Moorjani*, (1975) 88 L.W. 559.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court (VI Assistant Judge), Madras, dated 20th September, 1975 and made in I.A. No. 7429 of 1975 in O.S. No. 7619 of 1974.

K. G. Manickavasagam, for Petitioner.

K. Venkatasami, for Respondents.

The Court made the following

ORDER.—This revision illustrates how recalcitrant the tenant could be. An order of exemption was passed in G.O. Ms. No. 3397, dated 25th September, 1969 on the application of one Thirumathi V. Alamelu Ammal in respect of the premises No. 8, Prasanna Vinayagar Koil Street, Mylapore forming subject-matter of the present revision from the operation of the provisions of Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960). Thereupon O.S. No. 7619 of 1974 was filed before the City Civil Court (6th Assistant Judge) Madras for recovery of possession. Pending suit the landlady (V. Alamelu Ammal) died on 12th March, 1975. Thereafter, I.A. No. 7249 of 1975 was taken out to bring on record petitioners 1 to 6, *viz*., the husband and other relations as legal representatives. It was contended on behalf of the revision petitioner that the exemption was granted in favour of the deceased-plaintiff (V. Alamelu Ammal) and therefore the cause of action did not survive to enable the legal representatives to come on record and therefore the application was liable to be dismissed. The learned 6th Assistant Judge did not agree with this contention and therefore allowed the application. It is to revise that order the present revision has been preferred.

2. Mr. K. G. Manickavasagam very strenuously contends before me that the exemption was granted in favour of Thirumathi V. Alamelu Ammal who was the sole plaintiff in the suit O.S. No. 7619 of 1974 and therefore there was no possibility of the legal representatives coming on record. In support of his submission, the learned counsel relies on *Phool Rani* v. *Naubat Rai*[1] and *Hajee Abdulla Sait* v. *K. D. Moorjani*[2]. In the first of the decisions cited the question related to the maintainability of the petition before the Rent Control Court wherein the original landlord sought eviction of the tenant on the ground of personal occupation for himself and members of his family. In deciding that question it was laid down that the cause of action being personal *viz*., *bona fide* need of the landlord the legal representatives cannot seek eviction in that petition and therefore the cause of action did not survive. This case has absolutely no application to the facts of the present case and therefore is clearly distinguishable. The order of exemption as noted above has nothing to do with the individual. In other words, it is not personal to the grantee. However, Mr. Manickavasagam, learned counsel for the petitioner would contend that a reading of the entire order would clearly show that what operated in the mind of the Government was only a personal relief for the erstwhile landlady (V. Alamelu Ammal). In my view this is not the correct reading of the order. In the petition for exemption itself what the landlady put forward was that she purchased the premises in question solely with the idea of making it available for the occupation of her daughters and grandchildren who were studying in the Rosary Matriculation School, Mylapore, very near to the premises but is unable to do so since the tenant had refused to vacate and that she has no remedy under the provisions of the Act to evict him.

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1. (1973) 2 S.C.J. 589: (1973) 3 S.C.R. 679 : A.I.R. 1973 S.C. 2110.
2. (1975) 88 L.W. 559.

3. In the operative portion of the order granting exemption it is also stated "If the exemption applied for by the landlady is not granted her daughters may have to continue to live in a cramped quarters and her grandchildren put to the difficulty of going to the school at Santhome, Mylapore from Royapettah." Apart from there being nothing to suggest that the exemption is personal to the grantee, the operative portion noted above would clearly show throughout the stress was to house, the married daughters and the grandchildren. Therefore, even looked at from that point of view, the argument that it was personal to the grantee cannot be coutenanced.

4. *Hajee Abdulla Sait* v. *K. D. Moorjani*[1], will also be of no assistance to the revision petitioner in the view I have just now indicated.

5. Finally it is argued on behalf of the revision petitioner that the question who are the proper legal representatives could be left open to be agitated by the revision petitioner. I find it rather difficult to follow this argument. Admittedly, the persons who are the legal representatives and who want to have the benefit of the order of exemption are seeking to come on record. If that be so, it is not open to the tenant to say who are the legal representatives and who are not. In a way, he should be thankful because if the suit were to be dismissed it will be binding upon all persons who have voluntarily chosen to come on record as legal representatives of the erstwhile landlady (V. Alamelu Ammal). Thus, I am unable to see any merit in this revision. Consequently it will stand dismissed. However, there will be no order as o costs.

6. Inasmuch as the order of exemption is, dated 25th September, 1969 the benefit of it had not been had by the respondents herein. I think it is a fit case wherein I should give direction for the expeditious disposal of the suit itself. Accordingly it is directed that the learned 6th Assistant Judge, City Civil Court will dispose of the suit before summer recess.

R.S. ——— *Appeal dismissed.*

1. (1975) 88 L.W. 559.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, J.*

N. M. Parthasarathi .. *Petitioner**

v.

V. Dharmalingam and others .. *Respondents.*

(A) *Civil Procedure Code* (*V of* 1908), *Order* 8-*A*, *rule* 1—*Suit on promissory note—Notice to third party—If can be issued.*

(B) "*Contribution*" *and* "*indemnity*"—*Meaning of.*

The words "contribution" and "indemnity" used in Order 8-A, rule 1 Civil Procedure Code, have a special significance. Such indemnity or contribution need not necessarily arise from a contractual liability. If on the facts, justice or equity requires a co-defendant to contribute to or indemnify the other defendants on record, than the Court would have jurisdiction to issue third party notice. The mere circumstance that such action is based on a negotiable instrument would not make any difference. It is not improper to issue such third party notices in an action based on promissory notes. [*Para.* 3.]

Cases referred to:—

Uthaman Chettiar v. *Thiagaraja Pillai*, (1955) M.W.N. 799 : (1955) 68 L.W. 810 : A.I.R. 1956 Mad. 155; *Muniandi* v. *Selvarajan*, (1968) 2 M.L.J. 12.

Petition under section 115, Civil Procedure Code, praying the High Court to revise the order of the Court of the Subordinate Judge, Vellore, dated 2nd May, 1973 and made in I.A. No. 296 of 1973 in O.S. No. 91 of 1971.

M. Srinivasan for *K. N. Balasubramanian*, for Petitioner.

The Court made the following

ORDER.—The first defendant in O.S. No. 91 of 1971 on the file of the Principal

* C.R.P. No. 1302 of 1973. *27th August,* 1975.

Subordinate Judge, Vellore, filed an application under Order 8-A and rule 8 of the Civil Procedure Code, praying that a third party notice be issued to defendants 3 to 7 and thereafter, in the course of trial, the question of contribution by them to him on the basis of an alleged indemnity claimed by reason of the petitioner and defendants 3 to 7 being joint co-promisors in a negotiable instrument be decided. That application was dismissed. The short facts are as follows. The petitioner and defendants 2 and 3 (defendant 2 having died, defendants 4 to 7 have been brought on record as his legal representatives) were co-promisors in a promissory note—executed on 29th May, 1968 for a sum and consideration of Rs. 8,000. There is no dispute about the execution of the suit promissory note by the petitioner and defendants 2 and 3. The plaintiff, having come to Court, has sought for a decree against all the executants on the face of the promissory note. Various defences were raised, the notable defence amongst which is that the monies were not borrowed for purposes of the limited company in which the petitioner and defendants 2 and 3 were directors and that it benefited only the petitioner. It is not necessary to set out in detail the various defences. In the course of the trial, the first defendant, as co-promisor along with defendants 2 and 3, filed the present application under Order 8-A of the Civil Procedure Code, stating that in the event of a decree being passed in favour of the plaintiff as against all the defendants, he would be entitled to contribution from defendants 2 and 3, as their specific case is that they are not responsible, though they are executants of the suit promissory note, for the payment of the suit amount as they did not benefit by it and their case is that if at all the first defendant-petitioner was the sole beneficiary thereof. As I said, it is not necessary to pursue the defence or analyse the same any further. In the context of the specific plea taken, the first defendant filed the present application. The learned Judge was of the view that the application was mis-conceived and that it was intended to drag on the proceedings. From the judgment it is seen that no judgment of this Court was brought to the notice of the learned Subordinate Judge. Obviously, he was under the impression that Order 8-A would not apply to negotiable instruments.

2. In revision, Mr. Srinivasan, learned counsel for the petitioner contends that Order 8-A would enable the Court to issue a third party notice even in cases where the subject-matter of the action is a promissory note. He would rely upon the decisions of our Court in *Uthaman Chettiar* v. *Thiaga raja Pillai*[1], that of Panchapakesa Ayyar, J., reported in *Uthaman Chettiar* v. *Thiagaraja Pillai*[1] and that of mine in *Muniandi* v. *Selvarajan*[2]. The respondents are not represented by counsel. On the foot of the ratio of the above two decisions it is contended that the lower Court was wrong in having summarily rejected the prayer for the issue of the third party notice.

3. I am inclined to agree with the learned counsel. The words "contribution" and "indemnity" used in Order 8-A, rule 1, Civil Procedure Code, have a special significance. Such indemnity or contribution need not necessarily arise from a contractual liability. If on the facts, justice or equity demands that one co-defendant is liable to contribute or indemnify the other defendants on record, then the Court would have jurisdiction to issue a third party notice. The mere circumstance that such action is based on a negotiable instrument would not make any difference. That it is not improper to issue such third party notices in actions based on promissory notes has been recognised as early as 1956 by Panchapakesa Ayyar, J., in *Uthaman Chettiar* v. *Thiagaraja Pillai*[1]. Though he would generally observe that suits on promissory notes and negotiable instruments would stand on a different footing from other suits, yet he would say that there was some force in the contention that third party notices can be issued even in suits on promissory notes, and in fact he agreed with this contention. In the

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1. (1955) M.W.N. 799 : 68 L.W. 810: A.I.R. 1956 Mad. 155.

2. (1968) 2 M.L.J. 12.

later decision of mine, after referring to the meaning of the words "contribution" and "indemnity" I expressed the view that a third party notice could be issued unless there is a contract to the contrary in the negotiable instrument itself so as to quantify the liability amongst the co-promisors at or about the time when a decree is passed. I have already expressed that the foundation on which contribution or indemnity is based need not always spring from a contract, but it might flow from justice or equity of the case. That being the situation, and in view of the attitude of defendants 2 and 3 that they are not liable for the suit claim and it is only the first defendant who has to bear the entirety of it, it is but natural that the petitioner has preferred an application under Order 8-A so that at the time of the passing of the decree in the suit, the liability *inter se* amongst the co-promisors could be quantified and ascertained. The best means of such ascertainment, while a decree is passed in the main action, is by invoking the third party procedure and settling the debatable issue even at that stage. It is not necessary, as the lower Court thought, that the petitioner should await and thereafter file an independent action to recover the suit amount as might be due from the other co-promisors. In this view of the matter, the order of the lower Court is without jurisdiction and it is, therefore, set aside. The civil revision petition is allowed. There will be no order as to costs.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *V. Sethuraman, J.*

Durai Knitting Co., by its Partner R. Duraiswami .. *Appellant**

v.

E. Ramasubramanian and another .. *Respondents.*

Transfer of Property Act (*IV of* 1882), *section* 76 (a)—*Usufructuary mortgage—Property leased at the time of mortgage—Tenant vacating premises—Mortgagee leasing out the property—Mortgagor selling the property—Purchaser's suit for redemption and eviction of tenant—Tenant claiming benefit of Tamil Nadu Buildings* (*Lease and Rent Control*) *Act—Whether tenable.*

The protection under the Tamil Nadu Buildings (Lease and Rent Control) Act is not derived from the usufructuary mortgagee but is referable to the statute. So long as the statutory protection is available, whether the tenant is inducted by the usufructuary mortgagee or anyone else, who was competent to let out the property, the tenant could not be treated as a trespasser but could claim rights as a tenant under the provisions of the said statute. [*Para.* 9.]

Cases referred to—

Film Corporation Ltd. v. *Gyan Nath*, (1970) 2 S.C.R. 581 ; *Harihar Prasad Singh* v. *Must. of Munshi Nath Prasad*, 1956 S.C.R. 1 : 1956 S.C.J. 279 : A.I.R. 1956 S.C. 305 ; *Prabhu* v. *Ram Dey*, (1966) 3 S.C.R. 676 : (1967) 1 S.C.J. 60: A.I.R. 1966 S.C. 1721; *Mahabir Gope* v. *Harbans Narain Singh*, (1952) S.C.R. 775 : 1952 S.C.J. 292 : A.I.R. 1952 S.C. 205 ; *Tajammul Hussain* v. *Mir Khan*, A.I.R. 1974 All. 234 ; *Chandrasekharan* v. *Kunju Vanniar*, 88 L.W. 216 : A.I.R. 1975 Mad. 227.

Appeal against the decree of the District Court, Tirunelveli in Appeal Suit No.86 of 1972, preferred against the decree of the Court of the District Munsif of Tirunelveli in O.S. No. 1036 of 1970.

* S.A. No. 318 of 1973. *6th October*, 1975.

T. R. Ramachandran, T. R. Rajagopalan and *T. R. Rajaraman*, for Appellant.

N. Srivatsamani, for 1st Respondent.

P. B. Ananthachari and *T. N. Vallinayagam*, for 2nd Respondent.

The Court delivered the following

JUDGMENT.—This second appeal raises an interesting question as to whether there could be a suit for possession against a tenant let in by a usufructuary mortgagee of the property, whose mortgage has been redeemed. The facts are in a short compass. The suit property which is a shop building situated within the Municipal limits of Tirunelveli, belonged to one Nellaiappa Pillai. He usufructuarily mortgaged the same in favour of the first defendant under a deed of usufructuary mortgage, dated 2nd July, 1965 which is marked as Exhibit B-1 in the suit, for a sum of Rs. 3,000 redeemable on or before 1st July, 1970. The mortgagor Nellaiappa executed a sale deed. Exhibit A-1, dated 31st July, 1967 for a sum of Rs. 7,750 in favour of the plaintiff. Out of the sale consideration, a sum of Rs. 3,000 was reserved with the plaintiff to discharge the othi debt due under Exhibit B-1. The plaintiff offered the othi amount due under Exhibit B-1 to the first defendant and asked him to hand over vacant possession of the suit property. Since the first defendant was evading to do, the plaintiff issued a notice under Exhibit A-2 on 1st July, 1970 requiring him to deliver vacant possession of the property on the redemption of the mortgage. The first defendant sent a reply under Exhibit A-3, dated 4th July, 1970 stating in effect that he was not in a position to give vacant possession, since the same had been let out to the second defendant. The plaintiff thereafter filed O.P. No. 33 of 1970 on the file of the Court of the District Munsif, Tirunelveli, and deposited the othi amount. The first defendant filed a counter-affidavit expressing his inability to deliver vacant possession, though he expressed his willingness to receive the mortgage amount deposited. The said O.P. was dismissed on 15th September, 1970. Since the plaintiff had deposited the mortgage amount and as vacant possession was not given by the first defendant, the plaintiff claimed to be entitled to get damages at the rate of Rs. 30 per month in lieu of interest. The plaintiff, therefore, filed the suit for redemption and for getting vacant possession of the suit property from the defendants with damages at the rate of Rs. 30 per mensem from 11th August, 1970 when the othi amount was deposited till delivery of possession.

2. The first defendant contested the suit on the ground that when the usufructuary mortgage deed was executed there was one Nallaperumal who was enjoying the suit property and that the usufructuary mortgagee did not get actual possession of the suit property. The said tenant Nallaperumal vacated and the shop was rented out to one Ziffree. Subsequently Ziffree vacated the shop and the first defendant rented it out to the second defendant in January, 1969 for a sum of Rs. 55 per mensem. It was submitted that the second defendant was the tenant in the premises, and that the plaintiff had to take appropriate proceedings against him to evict him.

3. The seccond defendant filed a separate written statement contending that he was ready and willing to attorn to the plaintiff and that since he was a tenant, the plaintiff's claim for possession was untenable and that the plaintiff had to take appropriate proceedings under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, if he wanted to evict him.

4. The learned District Munsif came to the conclusion that the first defendant was not given actual possession of the suit property by the plaintiff's vendor Nellaiappa Pillai, that the first defendant was liable to deliver vacant possession of the suit property and that the second defendant was liable to be evicted from the suit property. He decreed the suit accordingly, and held also that the plaintiff was entitled to claim damages at the rate of Rs. 30 per mensem from 11th August, 1970 as claimed in the plaint.

5. For our present purpose it is enough to mention that the second defendant preferred an appeal *viz.*, A.S. No. 86 of 1972 to set aside the decree of the lower Court in so far as it was against him.

The learned Subordinate Judge, after referring to certain decisions cited before him, came to the conclusion that the second defendant had no right to continue in possession, after redemption because his right to continue in possession would cease automatically on redemption and that, therefore, he was liable to be evicted. He, therefore, dismissed the appeal that was filed before him.

6. The present appeal has been filed by the second defendant-tenant, and the contention urged on his behalf was that he was a tenant entitled to the protection under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act and that a civil suit did not lie for the purpose of his eviction. The learned counsel for the respondents submitted that with the redemption of the usufructuary mortgage the title of the second defendant to continue in the suit premises ended.

7. The short point is whether the second defendant, who was introduced by the usufructuary mortgagee, whose mortgage has been redeemed can continue as tenant so as to be eligible for the protection under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, after the date of the redemption. In Mulla's Transfer of Property Act, Sixth Edition, at page 528 is an interesting discussion as to whether a mortgagee in possession can by reason of clause (*a*) grant a lease of the mortgaged property. After referring to several Supreme Court decisions, some of which had not been considered in the later decisions, the learned author pointed out as follows :—

> "In *Film Corporation Ltd.* v. *Gyan Nath*[1], the Supreme Court again considered the question. The Court did not refer to either *Harihar Prasad Singh* v. *Must. of Munshi Nath Prasad*[2] or *Prabhu* v. *Ram Dev*[3]. The Court observed that the principle laid down in *Mahabir Gone's case*[4], that a *bona fide* and prudent lease would bind the mortgagor 'ordinarily' applies only to agricultural lands and has 'seldom' been extended to urban property. This observation is strictly speaking *obiter*, as the Court found that the lease in question was neither *bona fide* nor prudent in view of the long term and the low rent. It is respectfully submitted that there is no warrant for limiting section 76 (*a*) to agricultural land. Whether a particular lease is *bona fide* or prudent is a question of fact ; obviously a lease of urban land which would confer on the lessor the protection of special statutes such as the Rent Acts would *prima facie* be imprudent."

This passage would go to show that the enquiry in a case of this kind is to find out whether the lease was a prudent lease or not. The learned counsel for the appellant submitted that the property had been under the lease even at the time when the usufructuary mortgage was created and that, therefore, leasing out the shop, at a higher rent when the shop became vacant, was nothing, but a prudent act. In the absence of any proof to the contrary this submission is *prima facie* acceptable.

8. A Full Bench of the Allahabad High Court was concerned with this very question in *Tajammul Hussain* v. *Mir. Khan and others*[1]. A house, situated within the limits of Aliganj Town Area, District Etah, belonged to one Tajamul Hussain. He mortgaged it with *S* and two others. The mortgagees were to be in possession. The mortgagees, thereafter, let out the premises to one *M*, after taking a rent deed from him. The mortgage was redeemed and the mortgagor in the redemption suit, it was held, could get only symbolic possession. The mortgagor thereafter filed the suit giving rise to the appeal, which came before the Full Bench, for possession against *M* and others, who were the tenants, on the ground that after the redemption of the mortgage, the status of the tenants was only that of trespassers and they that were liable to be evicted from the premises in question. After referring to several decisions of the Supreme Court, some of which

1. (1970) 2 S.C.R. 581.
2. 1956 S.C.R. 1 : 1956 S.C.J. 279 : A.I.R. 1956 S.C. 305.
3. (1966) 3 S.C.R. 676: (1967) 1 S.C.J. 60: A.I.R. 1966 S.C. 1721.
4. 1952 S.C.R. 775 : 1952 S.C.J. 292 : A.I.R. 1952 S.C. 205.

1. A.I.R. 1974 All. 234.

have been noticed in the passage in Mulla on the Transfer of Property Act extracted earlier, the Allahabad High Court held as follows :—

"The general rule that a lease executed by a mortgagee in possession would come to an end and the rights of the person holding under the same would get extinguished on the redemption of the mortgagee is, however, subject to one exception contained in section 76 (*a*) of the Transfer of Property Act which applies not only to agricultural land but also to urban immovable property. Hence, if during the subsistance of the mortgage, the mortgagee, like an ordinary prudent man, lets out the mortgaged premises and enters into a *bona fide* transaction in connection therewith, in that event the rights of such a person admitted to tenancy would not get automatically extinguished on redemption of the mortgage. The person, so let in, would be entitled to continue in occupation of the premises as a tenant of the mortgagor after redemption. The principle, behind section 76 (*a*) appears to be based on the hypothesis that in case a mortgage had not been executed and the mortgagor as owner had remained in possession, he would, have also similarly let out the premises, and, therefore, if instead of the mortgagor, the mortgagee, who came in his place, did the same, it would be considered as binding on the mortgagor as well."

The test propounded is whether the mortgagor would have let out the suit property. In the present case there is enough evidence to show that even at the time when Nellaiappa Pillai executed the mortgage the property was in the occupation of the tenant. Therefore, when the mortgagee, the first defendant, let out the property to the second defendant as tenant, he was not committing any imprudent act, which is outside the scope of section 76 (*a*) of the Transfer of Property Act.

9. A similar question came up for consideration before a Full Bench of this Court, to which I was a party, in *Chandrasekaran* v. *Kunju Vanniar and others*[1]. The question in that case was whether a tenant under a mortgagee could claim protection against a mortgagor under the Tamil Nadu Cultivating Tenants Protection Act, 1955. In dealing with the question as to whether the mortgagee could confer a greater title on the tenant than what he himself had the learned Chief Justice delivering the judgment for the Full Bench pointed out as follows :—

"There is no question of the usufructuary mortgagee conferring upon the tenant a higher title than what he is possessed of. What happens for purposes of the inclusive definition 'cultivating tenant' is that no higher title than what the usufructuary mortgagee possessed is conferred on the cultivating tenant. But the statute intervenes at the determination of the tenancy agreement and enjoins that if the contractual tenant within the meaning of the first part of the definition of 'cultivating tenant' continues in possession of the land, he would be entitled to protection as a cultivating tenant."

The principle is that the protection under the Tamil Nadu Buildings (Lease and Rent Control) Act, is not derived from the usufructuary mortgagee, but is referable to the statute. So long as the statutory protection is available, whether the tenant is inducted by the usufructuary mortgagee or anyone else, who was competent to let out the property, then the tenant could not be treated as a trespasser, but could claim rights, as a tenant under the provisions of the said statute. I am, therefore, unable to accept the conclusion of the learned Subordinate Judge to the contrary. The appeal is allowed with costs. No leave.

S.J. ——— *Appeal allowed.*

1. 88 L.W. 216 : A.I.R. 1975 Mad. 227.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Thangam *alias* **Palanichamy Chettiar** .. *Appellant**

v.

Shanmugham *alias* **Palanichamy Chettiar and others** .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11—*Suit for partition—Temple properties—Management of—Execution petition—Plea not raised earlier raised later—Constructive* res judicata —*Whether applicable.*

The plaintiff filed a suit for partition in 1943 and this was decreed. One of the schedule properties related to a temple and the management was given in turn between the plaintiff and the defendants. The plaintiff filed an E.P. in 1946 in which the defendants raised the plea that the decree in respect of the temple properties was in the nature of a preliminary decree. The contention was negatived. That order had become final and binding between the parties. The plaintiff filed another E.P. on 17th October, 1974 for recovery of possession of the temple properties on the ground that the third respondent's possession had come to an end on 7th October, 1974. One of the objections taken to the E.P. was that the decree in respect of the temple properties was merely declaratory in nature and cannot be executed. The plaintiff contended that this point was not raised in the E.P. filed in 1946 and the principle of constructive *res judicata* will apply. The plaintiff who lost in the lower Court preferred an appeal.

Held: It was open to the respondents (judgment debtors) to have raised this plea earlier. But they did not do so. In such an event, undoubtedly the principle of constructive *res judicata* would apply. [*Para.* 4.]

Cases referred to :—

Subba Rao v. *Venkatanarasimha Rao*, 64 L.W. 227 : A.I.R. 1951 Mad. 736 ; *Ramanathan Chettiar* v. *Madura Sri Meenakshi Sundareswarar Devasthanam*, (1937) 2 M.L.J. 887 : 46 L.W. 701 : 174 I.C. 934 : (1937) M.W.N. 1159: A.I.R. 1938 Mad. 256 ; *Shanmughavelu* v. *Karupannaswami*, (1964) M.W.N. 733 ; A.I.R. 1954 Mad. 1070; *Mathura Prasad* v. *Dossibai*, (1970) 2 S.C.J. 685 : (1970) 3 S.C.R. 830: A.I.R. 1971 S.C. 2355.

* A.A.A.O. No. 98 of 1975 and C.M.P. No. 9060 of 1975. 26*th August*, 1975.

A.A.A.O. No. 98 *of* 1975.

Appeal against appellate order of the Principal District Court, Madurai, dated 8th July, 1975 and made in C.M.A. No. 46 of 1975 (E.P. No. 267 of 1974 in O.S. No. 9 of 1943, Sub-Court, Madurai.)

C.M.P. No. 9060 *of* 1975.

Petition presented to the High Court to admit the following documents as additional documents in the above C.M.S.A. on the file of this Court.—

1. Copy of the partition deed, dated 4th July, 1956; 2. Receipt for taking possession by D 1, 3 to 9, dated 6th October, 1952 ; 3. Letter, dated 1st October, 1965 to the defendants; 4. Receipt for taking possession by D.1, 2 to 9, dated 6th October, 1956 ; 5. Receipt for taking possession by D 1,3 to 9, dated 6th October, 1960; 6. Receipt for taking possession by D 1, 3 to 9, dated 6th October, 1964; 7. Receipt for taking possession by D 1, 3 to 9, dated 6th October, 1968; 8 Receipt for taking possession by D-1, 3 to 9, dated 6th October, 1972.

S. Rajaram, for Appellant.

Veluswami, D. Anandan, S. Natarajan, K. Raman and *R. Sitaraman*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this civil miscellaneous second appeal and the short facts are as follows :—The plaintiff and defendants 1 to 9 constituted members of a joint family. The plaintiff is the son of the second defendant (since deceased). The first defendant was the brother of the second defendant. Defendants 3 and 4 are the other brothers of the first defendant and defendants 5 to 9 are the sons of the third defendant. The appellant filed O.S. No. 9 of 1943 for partition and separate possession of his

one-fourth share in the plaint *A* and *B* schedule properties and for the management of the *C* schedule temple and its properties in turns between himself, second defendant, first defendant and defendants 3 to 9 for a period of two years by turns and for accounts in respect of the income. A decree was passed on 31st March, 1944. It is with reference to clause 3 of the decree concerning the schedule, the entire dispute has arisen. That clause reads as follows : "The *C* schedule properties be managed in turns between the plaintiff and the second defendant on the one hand and defendants 1 and 3 to 9 on the other, each branch for a period of two years". According to the plaintiff, the third respondent's possession came to an end on 7th October, 1974 and, therefore, he preferred E.P. No. 267 of 1974 on 17th October, 1974 for recovery of possession of the *C* schedule as provided in the above clause—*inter alia* objections were taken, firstly that clause 3 of the decree was merely declaratory in nature and, therefore, was not executable and, secondly, since the last of the execution petitions came to be filed only on 29th September, 1948, the present execution petition, being beyond the twelve year period of limitation as prescribed under Article 136 of the Limitation Act, was barred by time. Both these objections were overruled by the executing Court. On appeal in C.M. A. No. 46 of 1975, these objections were upheld and, consequently, the execution petition was dismissed. Hence the present A.A.A.O.

2. Mr. Rajaram, the learned counsel appearing for the appellant contends before me that the lower appellate Court erred in relying upon *Subba Rao* v. *Venkatanarasimha Rao*[1] and *Ramanathan Chettiar* v. *Madura Sri Meenakshi Sundareswarar Devasthanam*[2], to hold that clause 3 was merely declaratory in character since those two cases related to scheme decrees under section 92 of the Code of Civil Procedure. It is the further submission of the learned counsel that if the third respondent's management came to an end only on 6th October, 1974 the present execution petition, having been filed on 17th October, 1974 was well within time. With the leave of the Court, he also sought to raise another point based on the principle of constructive *res judicata*. According to him, E.P. No. 203 of 1946 was filed and the question as to the nature of clause 3 was not raised there and inasmuch as that has not been done, on the principle of constructive *res judicata* the present plea that clause 3 were merely declaratory in nature cannot be raised. (I allowed him to raise this because it is not disputed by the respondents that the said execution petition was preferred in 1946 and was also dismissed by an order of the learned Subordinate Judge of Madurai on 4th September, 1940 and this plea was not specifically raised. Moreover, this is purely a question of law). In support of this, the learned counsel relies on *Shanmugavelu* v. *Karuppannaswami*[1].

3. In meeting these submissions, it is contended by Mr. Veluswami, the learned counsel appearing for the respondents that the principle of constructive *res judicata* will not apply here since it is a pure question of law and to such cases the said principle cannot be made applicable in view of the decision in *Mathura Prasad* v. *Dossibai*[2]. On the point of limitation, it is the contention of the learned counsel appearing for the respondents that the last of the execution petitions was filed only in 1948 and there is no proof that the third respondent was in management till 6th October, 1974 in which event the present execution petition would be barred in view of Article 136 of the Limitation Act.

4. Suffice it for the purpose of the C.M. S.A. to deal with only two questions, namely: (1) the principle of constructive *res judicata*; and (2) limitation. If I am to hold that the principle of constructive *res judicata* applies the other question as to whether clause 3 is merely declaratory in nature or is capable of execution becomes purely academic. As seen from the records, E.P. No. 203 of 1946 was filed

1. 64 L.W. 227 : A.I.R. 1951 Mad. 736.
2. (1937) 2 M.L.J. 887 : 46 L.W. 701 : (1937) M.W.N. 1159 : 174 I.C. 934 : A.I.R. 1938 Mad. 256.

1. (1954) M.W.N. 733: A.I.R. 1954 Mad. 1070.
2. (1970) 2 S.C.J. 685 : (1970) 3 S C.R. 830: A.I.R. 1971 S.C. 2355.

by the plaintiff for the enforcement of clauses 3 and 4 of the decree in O.S. No. 9 of 1943. It was contended in opposition to this execution petition that clauses 3 and 4 were in the nature of a preliminary decree and this contention was negatived by the executing Court by its order, dated 4th September, 1946. That order has become final and binding between the parties. It was well open to the judgement-debtors, *i.e.* the respondents herein to have raised this plea that clauses 3 and 4 were merely declaratory in nature. But for the reasons best known to them, they did not do so. In such an event, undoubtedly, the principle of constructive *res judicata* will apply. In fact in *Shanmughavelu* v. *Karuppannaswami*[1], it was held that the order made by the executing Court recognising the right of the decree-holder to execute the decree after overruling the objection of the judgment-debtor operates as *res judicata* as regards the maintainability of the execution application. I am unable to see as to how *Mathura Prasad* v. *Dossibai*[2] is helpful to the respondents. At page 2359, it was observed :

> " A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as *res judicata*. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute the question cannot operate as *res judicata* between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise."

In the instant case, no decision was rendered on the question of jurisdiction of the executing Court. The plea, is totally different, namely, failure of the present respondents to raise this plea as to the non-executability of the decree.

5. Turning to the question of limitation, the executing Court has clearly stated in its order that the third respondent was in possession till 6th October, 1974 and the petitioner's turn of management started only on 7th October, 1974 and, therefore, the execution petition was in time. Surprisingly, the learned District Judge would not even refer to this vital fact, but would merely hold that the last of the execution petitions was ordered on 29th September, 1948, and therefore, the present application was barred being more than thirty years after the date of the decree and more than twenty-six years after the last execution petition was disposed of and that Article 136 of the Limitation Act would apply. This finding, in my view, ignores the vital fact of the third respondent's possession up till 6th October, 1974 as noted by the learned Subordinte Judge. If the limitation is reckoned from that date, namely 7th October, 1974 when alone the right of the present plaintiff became enforceable, certainly the execution petition is within the time. Therefore, I have little hesitation in setting aside the judgment of the lower appellate Court and restore the order of the executing Court. Consequently, the civil miscellaneous second appeal will stand allowed with costs. No leave.

6. Mr. Rajaram, the learned counsel appearing for the appellant does not press this application in view of my order in the above C.M.S.A. and, consequently, this application (C.M.P. No. 9060 of 1975) will stand dismissed. No costs.

S.J. *Appeal allowed.*

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1. (1954) M.W.N. 733 : A.I.R. 1954 Mad. 1070 at 1072.
2. (1970) 2 S.C.J. 685 : (1970) 3 S.C.R. 830 : A.I.R. 1971 S.C. 2355.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *V. Sethuraman, J.*

Gnanamuthu .. *Appellant**

v.

Most Rev. Justin Diraviam .. *Respondent.*

Transfer of Property Act (IV of 1882), section 106—Notice to quit—Essentials—Telegram sent to tenant—If valid notice.

Section 106 of the Transfer of Property Act requires every notice to be in writing signed by or on behalf of the person giving it and either be sent by post to the party or be tendered or delivered personally to such party or to one of his family or servants at his residence, or if such tender or delivery is not practicable affixed to a conspicuous part of it. The section makes it clear that the notice reaching the party must contain the signature of the person giving the notice or his agent. In the case of telegraphic notice, it is true that as it was tendered to the Telegraphic Office the telegram must have contained the signature of the party giving it or his agent. But the copy received by the tenant did not contain the signature. The name of the sender was only typewritten. The notice suffers from infirmity and is not valid. [*Para.* 11.]

Cases referred to :—

Bradley v. *Atkinson*, (1885) I.L.R. 7 All. 899 (F.B.) : (1885) All.W.N. 288 ; *Alphonso Pinto* v. *Thukru Hengsu and another*, (1964) 2 M.L.J. 445 ; *Farroq Ahmed* v. *Muneshwar Bux Singh*, A.I.R. 1972 All. 155 ; *Hiralal* v. *Deputy Commissioner, Rai Barelli*, A.I.R. 1951 All. 483.

Appeal against the decree of the Court of the Subordinate Judge, Madurai in Appeal Suit No. 36 of 1972 preferred against the decree of the Court of the District Munsif (Principal) Madurai Town in Original Suit No. 811 of 1970 and Petition praying to admit registered notice dated 16th February, 1968 issued on behalf of Hilda Stazza to the petitioner as additional evidence in the above Second Appeal.

Raj and *Raj*, for Appellant.

T. Martin and *N. V. Balasubramanian*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The plaintiff purchased the suit property from one Miss. Stazza on 26th January, 1970. At that time the defendant was in occupation of the property as a tenant on a monthly rent of Rs. 25. The plaintiff requested the defendant to vacate the property and as he did not do so, a registered notice was sent to him. But it was returned with the endorsement 'Not found'. The plaintiff thereafter sent a telegram on 30th July, 1970 running as follows :—

"The portion issued to you by Stazza has been purchased by me. You have not received the registered notice sent to you. You have to vacate the portion in your occupation by the end of August, 1970. Justin Diraviam."

The defendant received the telegram, but did not vacate the property. It was stated in the plaint that the plot was a vacant piece of land, which is not controlled by the Madras Buildings (Lease and Rent Control) Act of 1960. Hence, the plaintiff filed a suit for recovery of possession of the property from the defendant and also for damages for use and occupation.

2. The defendant in his written statement pointed out that the description of the property given in the plaint as Door No. 40 was wrong, that he had put up a superstructure at a cost of Rs. 3,500 and planted some trees and that he was not aware of the purchase by the plaintiff. He denied having returned any registered notice and according to him, the telegram did not satisfy the mandatory statutory provisions. It was contended that the suit was not maintainable in law.

3. The learned District Munsif found that the plaintiff had title to the suit pro-

* S.A. No. 739 of 1974 and C.M.P. No. 635 of 1976.

20th February, 1976.

perty that the mention of the door number as 40 was just a mistake, and that he was entitled to recover possession thereof. He held also that the notice to quit was proper and valid and he, therefore, passed a decree for delivery of possession and for damages.

4. There was an appeal by the defendant and the learned Subordinate Judge framed two points for determination *viz.*, whether the plaintiff was entitled for recovery of possession of the suit property and whether the plaintiff was entitled to damages for use and occupation. He held that the plaintiff had title to the suit property and that he was entitled to damages for use and occupation. The unsuccessful defendant has appealed.

5. The only point agitated before me (from different angles) in the second appeal is whether the notice to quit satisfies the requirement of section 106 of the Transfer of Property Act. That section runs as follows :—

> "106. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.
>
> Every notice under this section must be in writing, signed by or on behalf of the person giving it, and (either be sent by post to the party) who is intended to be bound by it or tendered or delivered personally to such (party), or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

6. The first contention urged before me on behalf of the appellant is that the notice as if the tenancy was from one calendar month to another was not correct. The submission was that the tenancy commenced on 5th of one calendar month and ended on the 4th of the succeeding month. For this purpose, C.M.P. No. 635 of 1976 was filed for getting an additional document admitted at this stage. The admission thereof was opposed by the respondent on the ground that no sufficient cause has been made out for its reception at this stage. I have gone through the affidavit in support of the petition and I am not satisfied that any proper case has been made out for reception of additional evidence at this stage. C.M.P. No. 635 of 1976 is, therefore, dismissed.

7. This is a lease of an immovable property for non-agricultural purposes. It is to be deemed to be a lease from month to month terminable either by the lessor or the lessee by 15 days' notice expiring with the end of a month of the tenancy. The month of the tenancy would be a British calendar month in the absence of any contract to the contrary. There is no contract produced in this case, apart from the additional evidence sought to be produced at this stage which has not been admitted. The plaintiff was, therefore, right in proceeding, as if the lease was from one calendar month to another. The plaintiff had not let out the property to the defendant. If the defendant had any material to show that the tenancy was not from one calendar month to another, then he should have produced the relevant material. The relevant material could only have been in his possession and not having produced it or even referred to it at any stage, the plaintiff was justified in proceeding as if the tenancy related to a calendar month and giving notice on that basis. I do not, therefore, see any substance in the objection regarding the validity of the notice on the aforesaid ground.

8. It was next contended that the telegram did not terminate the tenancy, as such and that it did not, therefore, satisfy the provisions of section 106 of the Transfer of Property Act. In this connection reliance was placed on a decision of a Full Bench of the Allahabad High Court in *Bradley* v. *Atkinson*[1]. In that case the

1. (1885) I.L.R. 7 All. 899 (F.B.): (1885) All.W.N. 288.

landlord had let rooms in a dwelling house to a tenant. He sent a letter to the tenant saying that if the rooms occupied were not vacated within a month from that date, he (the landlord) would file a suit against the tenant for ejectment as well as for recovery of rent at the enhanced rate. As the tenant did not vacate, the landlord instituted a suit. It was held that the letter was not such a notice to quit as the law required, inasmuch as it was not a notice of the lessor's intention to terminate the contract at the end of a month of the tenancy. It may be noticed that in that case the tenancy had commenced from 1st July, 1882. The landlord gave notice on 11th December, 1882 saying that if the rooms were not vacated within a month, he would file a suit for ejectment. In the case of a tenancy from month to month, the notice has to be such as to expire with the end of the month of the tenancy. That was not the case there. There was not even the requirement to vacate the premises in the notice. It was only stated that if the rooms were not vacated, a suit would be filed. The notice in the present case does not run on similar lines so as to apply the decisions therein.

9. My attention was also drawn to another decision of the Allahabad High Court in *Farooq Ahmed* v. *Muneshwar Bux Singh*[1]. That was a case where even the notice was not produced before the Court so that there was no proof of a valid notice in that case. The Court proceeded as if there was a notice in which there was no termination of tenancy, but only for vacation of premises. It was held that it would not fulfil the requirements of section 106 of the Act. It is not clear how it was inferred that there was no notice for termination of tenancy and a mere request for vacation of the rented premises, when the notice itself had not been produced. I do not think that the said case is also helpful to decide the case before me. In my opinion, the notice saying that the tenant had to vacate the portion in his occupation by the end of August, 1960 was such as to terminate the tenancy. The question of vacating the premises would not arise unless there was a termination of tenancy. I, therefore, held that there was a proper termination of tenancy in this case.

10. On behalf of the respondent my attention was drawn to a decision of this Court in *Alphonso Pinto* v. *Thukru Hengsu and another*[1]. But that decision dealt with a case where the validity of the notice to quit was challenged on the ground that it did not contain particulars regarding the tenancy. It was held that the absence of those particulars were not material. Rajamannar, C.J., had no occasion to consider the question as to whether there must be a specific termination of tenancy in the notice to quit. In my opinion, there is a substantial compliance with the requirements of section 106 of the Transfer of Property Act in the present case as far as termination of tenancy is concerned.

11. The last point argued was that section 106 required a notice in writing signed by or on behalf of the person giving it and that in this case there was no signature of the person giving the notice. It was contended that the defendant received only a telegram which did not contain any signature, as such. It was, therefore, argued that the provisions of section 106 of the Act had not been complied with. In this connection a decision of the Allahabad High Court in *Hira Lal* v. *Deputy Commissioner, Rai Bareilli*[2], was referred to. That was a case in which the Court of Wards was the landlord. A notice in manuscript was prepared in the office and was duly signed by the Deputy Commissioner concerned. However, what was sent to the tenant was not that notice, but a typed copy thereof with the name of the Deputy Commissioner typed at the end of it. There was no signature of the Deputy Commissioner or anyone else. It was held on these facts that there was no signature on the notice sent to the tenant and that therefore, it was not a valid notice. Unfortunately for the landlord in this case, this objection taken before me appear to be well-founded. The section requires every notice to be in writing signed by or on behalf of the person giving it and either to be sent by post to the party or be tendered or delivered personally to such party, or to one of his family or servants

1. A.I.R. 1972 All. 155.

1. (1964) 2 M.L.J. 445.
2. A.I.R. 1951 All. 483.

at his residence, or if such tender or delivery is not practicable affixed to a conspicuous part of it. On a reading of the section it is clear that the notice which reaches the party must contain the signature of the person giving the notice or his agent. In the present case, it is true that as it was tendered to the Telegraph Office, the telegram must have contained the signature of the party giving it or his agent. But the copy that was received by the tenant did not contain the signature. The name of the sender was only typewritten. The notice suffers from the same infirmity as in the Allahabad decision in *Hira Lal* v. *Deputy Commissioner, Rai Bareilli*[1] and is not thus valid.

12. On behalf of the respondent objection was taken to this point being raised at this stage, as this point was not taken in the Court below. For the appellant, the submission was that this point was taken and argued and that unfortunately the learned Subordinate Judge had omitted to deal with it. In the grounds of appeal filed in this Court there is a specific allegation of the error of the lower Court in not dealing with the validity of the notice. The respondent, however, stated that in his affidavit for expediting the hearing he had alleged that this point had not been taken in the lower Court and that it was not controverted. Assuming for a moment that the point had not been taken in the lower Court, being a question of law going to the root of jurisdiction, the point can be entertained at this stage. The validity of the notice had been put in issue in the trial Court. There is no reason to doubt the statement of the appellant that the point was taken in the lower appellate Court. However, even on the basis that the point had not been taken, I think it proper to entertain it and for the reasons mentioned above, I hold that the notice to quit is invalid. C.M.P. No. 635 of 1976 is dismissed. The Second Appeal is allowed. There will be no order as to costs. No leave.

R. S. —————— *Second appeal allowed.*

1. A.I.R. 1951 All. 483.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*A. Varadarajan, J.*

S. Saroja .. *Appellant**

v.

K. Arumugham and another .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11—*House—Earlier suit for declaration of title decreed but possession refused on ground of failure to prove lease alleged in plaint—Effect—Fresh suit for declaration of title—Bar of* res judicata *as to title.*

The plaintiff filed a suit for declaration of her title to the suit property. She had filed an earlier suit for declaration of title and recovery of possession against the respondents and in that suit her title was declared, but possession was denied. There was no appeal and the judgment and decree had become final. The trial Court decreed the instant suit on the ground that the plaintiff had already proved her title to the property in the earlier suit. However, on appeal by the respondents, holding that there was no bar of *res judicata* as regards title the appellate Court dismissed the suit. On further appeal by the plaintiff,

Held : There was bar of *res judicata* in this case regarding title in favour of the appellant and the appellant should be held to have already proved her title to the suit property and to have title to the same and she is not bound to prove her title again. [*Para.* 5.]

Cases referred to :—

Midanapur Zemindari Co., Ltd. v. *Naresh Narayan Roy,* 64 I.C. 231 : 48 I.A. 49 : A.I.R. 1922 P.C. 241 ; *Murad Biswas* v. *Basti Mandal,* A.I.R. 1929 Cal. 449.

Appeal against the decree of the Court of the Subordinate Judge, Nagercoil in Appeal Suit No. 166 of 1970, preferred against the decree of the Court of the Principal District Munsif of Nagercoil in Original Suit No. 185 of 1968.

S. Padmanabhan, for Appellant.

* S.A. No. 1124 of 1972. *23rd September,* 1975.

T. R. Rajagopalan and *V. Janakiraman*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, who succeeded in the trial Court but failed in the lower appellate Court, is the appellant. She is the grand-daughter of one Ponni Mandakkattal and daughter of Subbammal. Subbammal is the sister of the first respondent Arumugam, who is the husband of the second respondent. Radha. The suit was filed for declaration of the appellant's title to the suit property, which is a tiled building stated to be situate on 2 1/8 cents of land in Survey No. 3030/3-A of Vadassery Village and for recovery of possession thereof from the respondents. According to the appellant, the suit property belonged originally to her maternal grandmother, Ponni Mandakkattal, and was inherited by Subbammal on her death and that she inherited the property on the death of Subbammal in 1960. Ponni Mandakkattal was the wife of one Kolappan.

2. The defence was that the house property is situate in Survey No. 3144 and not in Survey No. 3030/3-A and belonged to Kolappan, the father of the first respondent, and that the appellant is not entitled to declaration and possession. The appellant had filed O.S. No. 695 of 1965 in the District Munsif's Court, Nagercoil, against the respondents for declaration of her title to the suit property and for possession on the basis that she had leased the property to the first respondent. Exhibits A-1 and A-2 are the certified copies of the judgment and decree passed in that suit. There was a decree only declaring the appellant's title to the suit property and the other relief of possession was denied to the appellant on the ground that she had not proved the lease pleaded in the plaint in that suit. There was no appeal and the judgment and decree passed in that suit had become final.

3. The trial Court, in the present suit, found that in view of the judgment and decree in the prior suit (Exhibits A-1 and A-2) it is not open to the respondents to question the appellant's title to the suit property and held that the appellant was in possession of the property within 12 years before suit in that she was actually living there until her marriage on 11th August, 1960, and decreed the suit as prayed for with costs. But, on appeal, the learned Subordinate Judge found that there was no bar of *res judicata* as regards title, that the appellant had failed to prove her title to the suit property and that the respondents had acquired title to the suit property by adverse possession, on the ground that the first respondent had been paying tax for the suit property from the year 1950. Relying on the Commissioner's report, Exhibit B-7, the lower appellate Court found that a major portion of the suit house is situate in Survey No. 3144 and not in Survey No. 3030/3-A. In view of his finding regarding title and possession, the learned Subordinate Judge allowed the appeal and dismissed the suit with costs.

4. The learned Subordinate Judge has relied upon the decision of the Privy Council in *Midnapur Zamindari Co., Ltd.* v. *Naresh Narayan Roy*[1], in holding that there is no bar of *res judicata* in the present case on the question of title and the appellant has to prove her title once again. That is a case where the entire suit was dismissed and it was not possible for the defendants to file any appeal. But, in the present case, as already stated, there was no dismissal of the former suit in its entirety, the appellant's title to the suit property had been declared and only the other portion of the appellant's claim, namely possession, had been dismissed. The learned counsel for the respondents concedes that the respondents could have filed an appeal against the decree declaring the appellant's title to the suit property in the previous suit. The learned counsel for the appellant invited my attention to the decision of a Bench of the Calcutta High Court in *Murad Biswas* v. *Basti Mandal*[2], where it was found on a reference to the record that the previous suit was one in which the plaintiff had asked for declaration of his title to the land and khas possession and that the defence was that the defendant was not a tenant holding under the plaintiff but was a co-sharer. That defence was gone

1. 64 I.C. 231 : 48 I.A. 49 : A.I.R. 1922 P.C. 241.
2. A.I.R. 1929 Cal. 449.

into and ultimately it was found that the plaintiff's title to the land was made out but, notice not having been served on the defendant, the suit was not dismissed but a decree was made in the plaintiff's favour in the following terms:

> "Ordered that the plaintiff's alleged title to the land in suit be declared, he cannot recover khas possession of the land but he may sue for settlement of fair rent and recovery of nasar if he likes".

The learned Judges have observed:

> "The facts therefore are not that the suit was dismissed on a preliminary point making it unnecessary for the Court to go into the other questions that arose in the suit but that the questions were decided and made the foundation of a decree declaring the plaintiff's title, and one of the prayers in the suit, namely, that for khas possession was refused on the ground that notice had not been served on the defendant."

Referring to the aforesaid decision of the Privy Council, the learned Judges have observed:

> "This cannot be said of the present case in view of the fact that the plaintiff's title was declared and it is only one of his prayers, namely, that for khas possession was refused on the ground that no notice was served. We are of opinion that the Courts below were right in the view that they took on the question of *res judicata*."

5. In view of the fact that the respondents could have filed an appeal against the previous decree declaring the appellant's title to the suit property, which is rightly conceded by the learned counsel for the respondents, and in view of the fact that the prior suit was not dismissed in full but a decree for declaration of the appellant's title to the suit property had been passed in that suit, and having regard to the said decision of the Bench of the Calcutta High Court, I find that there is a bar of *res judicata* in this case regarding title in favour of the appellant and that the appellant has to be held to have already proved her title to the suit property and to have title to the same and is not bound once again to prove her title to the suit property.

6. On the question of possession, it is impossible to agree with the view of the learned Subordinate Judge that the respondents had acquired title by adverse possession to the suit property merely because the first respondent had been paying tax for the property from 1950, notwithstanding the fact that the appellant was living in the suit property itself until her marriage on 11th August, 1960. The appellant having been in possession of the property until 11th August, 1960, it could not be stated that the respondents had acquired title to the suit property by adverse possession or that the appellant was not in possession of the property within 12 years prior to the date of the suit. I agree with the learned District Munsif and find that the appellant was in possession of the suit property within 12 years of the date of suit.

7. The second appeal is, therefore, allowed with costs throughout. No leave.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

T. N. Linga Gounder *Appellant**

v.

N. Kappa Gowder and another *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 2, *rule* 2—*Suit for declaration of title—Earlier suit for recovery of possession—Whether finding in earlier suit would be* res judicata—*Causes of action different though title was same in both suits—No bar to later suit.*

The plaintiff filed a suit for recovery of possession of the southern half of a certain survey number alleging wrongful possession by the defendant. On that date he did not have title to the northern portion. Subsequently, he filed a suit for declaration of his title and recovery of possession

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* S.A. No. 1647 of 1972. 25*th August*, 1975.

of the northern portion. The subsequent suit was decreed on the ground that the findings in the earlier suit operated as *res judicata*. The first defendant who was also claiming title and who was in possession of the property appealed.

Held: The cause of action for the earlier suit was trespass. In the later suit however the cause of action was very different. The causes of action being different the findings in the prior suit would not operate as *res judicata*. Matter remanded for fresh consideration.

[*Paras.* 11 *and* 12].

Cases referred to :—

Mohammad Khalil Khan v. *Mahbob Ali Mian*, (1948) 2 M.L.J. 318 : 61 L.W. 686 : 75 I.A. 121 : A.I.R. 1949 P.C. 78; *Suraj Rattan Thirani* v. *Azamabad Tea Co., Ltd.*, (1964) 6 S.C.R. 192: A.I.R. 1965 S.C. 295; *Soorjomonee Dasee* v. *Suddanund*, (1874) 12 Beng.L.R. 304: 20 W.R. 377; *R. Venkatanarasimhan* v. *K. Subba Reddy*, (1944) 1 M.L.J. 393 : 57 L.W. 286 : 1944 Mad. 435; *Ma Piwa Shin* v. *U. Fo Sin and another*, A.I.R. 1937 Rang. 324; *Ramprasad Singh* v. *Radha Panday*, A.I.R. 1941 Pat. 37; *Coke v. Gull*, L.R. 8 C.P. 107; *Reed* v. *Brown*, (1889) 22 Q.B.D. 128.

Appeal against the decree of the District Court, Coimbatore (West) in Appeal Suit No. 111 of 1969 preferred against the decree of the Court of the Subordinate Judge Nilgiris at Ootacamund in Original Suit No. 24 of 1961.

T. R. Ramachandran and *T. R. Rajagopalan*, for Appellant.

Parasurama Iyer, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant before me. The short facts relating to this Second Appeal are as follows:

2. The present suit O.S. No. 24 of 1961 was preferred before the Subordinate Judge's Court, Ootacamund, for a declaration of the plaintiff's title and also for recovery of possession 50 cents (northern half of Survey No. 22/2). The case of the plaintiff is that Lakshmi Ammal was the original owner and that the properties devolved on her grand-daughter, Giriammal, as stridhana heir and from whom he purchased under Exhibit A-1 dated 29th November, 1957 and notwithstanding this valid purchase by this plaintiff, the first defendant has been in continuous wrongful possession of the property. Hence the suit.

3. In the defence of the first defendant, it was contended that Rangiah the husband of Lakshmi Ammal, was the real owner who sold under Exhibit B-6 the entire property of one acre covered by Survey No. 22/2 in favour of Kapini Gowder from whom the first defendant had come to purchase the property under Exhibit B-7 dated 9th April, 1956, and therefore, his title ought to prevail. It was further, contended in defence that in so far as there was a prior suit, O.S. No. 54/57, in which the plaintiff originally sought for recovery of possession basing on the title of purchase from Vasudevan, son of Lakshmi Ammal, dated 12th March, 1956 and later sought to amend that suit by preferring I.A. No. 610 of 1957 basing on Exhibit A-1 dated 29th November, 1957, the failure to include the present claim with reference to the northern half would be hit by Order 2, rule 2 of Civil Procedure Code.

4. The learned Subordinate Judge who tried the suit came to the conclusion that the findings rendered in the prior suit *viz.*, O.S. No. 54/57, would constitute *res judicata*. The present suit, according to him, was not barred by Order 2, rule 2, Civil Procedure Code. These findings were affirmed by the learned District Judge, Coimbatore (West) in A.S. No. 111 of 1969. Hence the present Second Appeal.

5. The only question on which arguments have been addressed, somewhat strenuously, by Mr. T. R. Rajagopalan learned counsel for the appellant is that the present suit is clearly barred by Order 2, rule 2, Civil Procedure Code, and the submission put shortly is that no doubt on the date on which O.S. No. 54/57 was filed, the plaintiff did not get title under Exhibit A-1 and the title was based upon the purchase from Vasudevan on 12th March, 1956. But, in so far as I.A. No. 610/57 was filed to strengthen the title of the plaintiff on

the basis of Exhibit A-1, the claim relating to the northern half also ought have been included. The cause of action for both the suits being the same, the present suit is barred by Order 2, rule 2, Civil Procedure Code. In support of this contention, the learned counsel relies on a number of authorities which I will consider one by one, below.

6. Mr. Parasurama Iyer, the learned counsel for the respondent, would submit that it was impossible for the plaintiff to include in O.S. No. 54 of 1957, which was a suit relating to the southern half, the present claim relating to the northern half because the cause of action for the prior suit was trespass of the first defendant made on 15th April, 1956. Therefore, according to him the causes of action are different though there may be a similarity with reference to the reliefs. When the title was disputed by the defendant in the prior suit which was only for recovery of possession Exhibit A-1 was buttressed to strengthen the title of the plaintiff whereas the present suit is for a declaration of title and for recovery of possession. But there is no allegation of trespass and it is the continuance of the first defendant in wrongful possession that has given rise to the present suit. Therefore, there is no bar under Order 2, rule 2, Civil Procedure Code, and the cases cited by the learned counsel for the appellant are distinguishable. Before I delve into the merits of this case in particular, as to whether the causes of action are one and the same or different, let me refer to the various authorities cited by the learned counsel for the appellant.

7. *Mohammad Khalil Khan* v. *Mahbub Ali Mian*[1], is a case wherein the Judicial Committee summarised the test applicable to Order 2, rule 2, Civil Procedure Code. "The correct test in cases falling under Order 2, rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that, which was the foundation for the former suit." In that case it was held that "on the date when the original suit was filed it was possible for the appellant to sue and yet he did not" and therefore, the principle laid down under Order 2 was held applicable. But that is not the position here.

8. In *Suraj Rattan Thirani* v. *Azamabad Tea Co., Ltd.*[1], the meaning of cause of action came to be laid down as follows. That was a case with reference to Order 9, rule 9, Civil Procedure Code. It may be of interest to note that the ruling of the Privy Council cited earlier was quoted with approval in this case. But this decision is not in any way, helpful to the appellant:

To quote their Lordships:

"In considering whether the cause of action in the subsequent suit is the same or not as the cause of action in the previous suit, the test to be applied is are the causes of action in the two suits in substance—not technically identical?"

"(31) The learned Judge thereafter referred to an earlier decision of the Privy Council in *Soorjomonee Dasee* v. *Suddanund*[2], and extracted the following passage as laying down the approach to the questions "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action........"

"Applying this test we consider that the essential bundle of facts on which the plaintiffs based their title and their right to relief were identical in the two suits. The property sought to be recovered in the two suits was the same."

9. *R. Venkatanarasimhan* v. *K. Subba Reddy*[3], was a case in which the first suit was based on a contract with the father-in-law of the plaintiff. In defence a will was set up but that will was found

1. (1948) 2 M.L.J. 318 : 61 L.W. 686 : 75 I.A. 121 : A.I.R. 1949 P.C. 78.

1. (1964) 6 S.C.R. 192: A.I.R. 1965 S.C. 295 at 302.
2. (1874) 12 Beng.L.R. 304 at 315: 20 W.R. 377.
3. (1944) 1 M.L.J. 393 : 57 L.W. 286 : A.I.R 1944 Mad. 435.

to be not valid and hence the suit was decreed. Therefore, the second suit with reference to one of the items not included in the will or in the earlier suit was held to be barred under Order 2, Civil Procedure Code. But, in the instant case, the position in very different. The right to sue with reference to the northern half was not available on the date when O.S. No. 54 of 1957 was filed and therefore, this decision, also will have no application.

9. An illuminating passage occurs as to how the cause of action should be construed in *Ma Pwa Shin* v. *U. Fo Sin and another*[1], the learned Judge, Braund, J., held on a difference of opinion between Leach and Spargo, JJ.)

> "As I read the rule, there are three things: first, the 'cause of action'; secondly, the 'claim which the plaintiff is entitled to make in respect of the cause of action' and thirdly the 'relief in respect of the cause of action'. It seems to me that the Rule read as a whole, distinguishes between these three things. It does not say that the plaintiff shall 'include the whole cause of action' in the suit., but that he shall include 'the whole of the claim' he is entitled to make 'in respect of the cause of action'. The 'cause of action' and the 'claim' on it are treated by sub-section (1) as different things, the claim being 'in respect of, the cause of action'. That seems to me to be important to be borne in mind in dealing with this case. When we come to sub-section (2) which is the material one here, we find that, if he omits to sue 'in respect of any portion' of 'his claim' (which means, I think) the claim which ('he is entitled to make in respect of the cause of action') he is precluded from suing in a second suit in respect of that portion. That must I think refer to the portion of the claim, not to the portion of the cause of action and still less to any portion of the physical property which may be the subject-matter of the suit. The result, therefore, of an analysis of the rule is, I think, that one has to ask one self three exact questions; First, what was the "cause of action" in the first suit? Secondly, did the appellant 'omit to sue in the first suit in respect of any, and if so what portion of the claim which she was entitled to make in respect of that 'cause of action'? and thirdly, does the plaintiff in her second suit 'sue in respect of the portion so omitted?' First, then, what was the 'cause of action' in the first suit? The classic definition of a 'cause of action' is the definition of it by Brett, J. in *Cooke* v. *Gill*[1]. also per Lord Esher in *Read* v. *Brown*[2]. as:
>
> 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment the Court'.
>
> As I understand that, it means that the 'cause of action' consists of the facts upon which (to revert to the words of Order 2, rule 2) the plaintiff is entitled to base a 'claim' in a suit with reference to the subject-matter of the dispute. The claim he actually does make cannot, in my view, be material because what the rule makes the deciding factor is the claim which he is 'entitled' to make. It is, I think most important to appreciate that it is the claim which 'he is entitled to make' and not the claim he makes that is made the criterion under the rule".

But this, case again, is clearly distinguishable having regard to the facts of that particular case.

10. *Ram Prasad Singh* v. *Radha Panday*[3], was a case in which an auction-purchaser omitted to sue for recovery of possession with reference to a few of the items for which he had title and therefore, it was held that the suit was barred under Order 2, Civil Procedure Code. This decision, also does not support the appellant.

11. In my view, there is a good deal of confusion in the arguments of the appellant in that he seeks to attribute the same meaning to cause of action and relief.

1. A.I.R. 1937 Rang. 324 at 329.

1. L.R. 8 C.P. 107.
2. (1889) 22 Q.B.D. 128 at 131.
3. A.I.R. 1941 Pat. 37.

Applying the very test formulated by Braund, J., extracted above, it can be clearly seen that the cause of action and the claim on it are treated by sub-section (1) of Order 2, Civil Procedure Code, as different things, the claim being in respect of the cause of action and that is the reason which prompted Braund, J. to say:

> "When we come to sub-section (2), which is the material one here, we find that, if he omits to sue in respect of any portion of 'his claim' which means, I think, the claim which 'he is entitled' to make in respect of the 'cause of action' he is precluded from suing in a second suit in respect of that portion."

In the instant case, as seen above the cause of action O.S. No. 54 of 1957 was trespass on 15th April, 1956 on which date, undoubtedly, the plaintiff did not have title with reference to the northern portion. But according to the learned counsel for the appellant, all the damage was done by preferring I.A. No. 610 of 1957 to strengthen the title by virtue of purchase under Exhibit A-1 dated 29th November, 1957 since, by then, the title relating to the northern half had also come to be acquired and that alone is the cause of action for the amendment claimed relating to the northern portion which also ought to have been included. I am afraid that this argument overlooks that even by the amendment the title acquired in 1957, cannot be introduced in a suit filed earlier to the acquisition of this title. In other words, notwithstanding the amendment, still, the cause of action for the suit was only trespass on 15th April, 1956 and that cannot be altered by the amendment and therefore, the limited purpose of the amendment was as rightly held by the Courts below to strengthen the title of the appellant. In the present suit the cause of action is very different. Nowhere is there any allegation relating to trespass and it is the continued wrongful possession of the first defendant which forms the cause of action for the present suit. It cannot be gainsaid that the title is one and the same, in both the suits. But that is very different from cause of action.

12. Unfortunately, the Courts below have held that the findings in the prior suit would operate as *res judicata*. If really the causes of action are different, as has been held above, then, it is but necessary to have an independent consideration as to whether the title of the plaintiff under Exhibit A-1 could be upheld or that of the first defendant under Exhibit B-7 ought to prevail. This cannot be summarily disposed of on the principle of *res judicata*. Therefore, I have no other option but to remand the matter to the learned Subordinate Judge, Nilgiris at Ootacamund, for a fresh consideration on this limited question relating to the title. The parties will be at liberty to adduce such oral and documentary evidence as they feel like. Having regard to the fact that the suit is of the year 1961, the learned Subordinate Judge will dispose of the matter within 2 months from the receipt of this judgment. The records will be despatched immediatelys Hence the second appeal will stand allowed. Costs will abide the result of the suit. There will be a refund of the Court-fee paid on the memorandum of second appeal and also in the lower appellate Court.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Ratnavel Pandian, J.*

Natarajan residing at No. 35-A Third Street, Tatabad, Coimbatore-12 and others .. *Plaintiffs**

v.

C. S. Loganathan (deceased) and others .. *Defendants.*

Contract—Suit on—Purchase of shares—Purchase price to be paid in instalments—Earnest money paid—Default in payment of second instalment—Part of the amount paid on various dates—1st defendant pleading inability to complete the contract—1st defendant's claim to forfeit amounts paid by plaintiffs on account of their defaults—Time whether essence of the contract—1st defendant whether entitled to forfeit monies paid.

The plaintiffs entered into an agreement with the 1st defendant for the purchase of some shares and agreed to pay Rs. 10,000 as earnest money on the date of the execution of the document, Rs. 90,000 within one month thereafter and the balance of Rs. 1,05,000 within six months from that date. The plaintiffs after paying the earnest money of Rs. 10,000 did not pay the sum of Rs. 90,000 on the agreed date but paid Rs. 20,000 and executed another letter of agreement. Plaintiffs further paid another sum of Rs. 50,000 on a later date. Subsequently the 1st defendant expressed his inability to perform the contract and when the plaintiffs claimed the return of the sum of Rs. 80,000 paid by them, the defendant said that the amount had been forfeited. There was a clause in the original agreement that in case of failure by the plaintiffs, the earnest money of Rs. 10,000 would be forfeited. The plaintiffs filed the suit for the return of the sum of Rs. 80,000 with interest contending that time was not of the essence of the contract and the sum cannot be forfeited.

Held : The price and time of payment were expressly stated in the letters of agreement. The purchase of shares was commercial in nature. The contention that the first defendant by accepting Rs. 20,000 and his being a party to the second letter of agreement had waived the condition that time was of the essence of the contract cannot be accepted, because there was a clause in the second letter of agreement that the same terms and conditions as in the first letter of agreement would continue and there was no waiver. Time was of the essence of the contract. [*Para.* 8.]

Prima facie, the amount of Rs. 10,000 mentioned in the agreement as earnest money was liable to be forfeited in case of default of this nature. The forfeiture clause contemplated by the parties was only with reference to the amount of Rs. 10,000 and therefore, the first defendant was bound to return the amount paid by the plaintiffs less Rs. 10,000. [*Paras.* 17 *and* 18.]

A decree was given in favour of the plaintiffs for the recovery of Rs. 70,000 with interest thereon at 6 per cent. per annum. [*Para.* 19.]

Cases referred to :—

Roberts v. *Berry*, (1853) 3 D.G.M. & G. 291 ; *Hare* v. *Nicoll*, (1966) 1 All E.R. 285; *Mahabir Prasad Rungta* v. *Durga Datta*, (1961) 1 S.C.J. 569 : (1961) 1 An.W.R. (S.C.) 142 : (1961) 1 M.L.J. (S.C.) 142 : A.I.R. 1961 S.C. 990 ; *Shree Hanuman Cotton Mills and another* v. *Tata Aircraft Ltd.*, (1970) 2 S.C.J. 420 : (1970) 3 S.C.R. 127 : A.I.R. 1970 S.C. 1986 ; *Fateh Chand* v. *Balakrishan Das* (1964) 1 An.W.R. (S.C.) 60 : (1964) 1 M.L.J. (S.C.) 60 : (1964) 1 S.C.R. 515 : (1964) 1 S.C.J. 187 : A.I.R. 1963 S.C. 1405 ; *Meenakshinada Dikshitar* v. *Murugesa Nadar and another*, (1969) 1 M.L.J. 474: A.I.R. 1970 Mad. 391; *Maula Bux* v. *Union of India*, (1970) 1 S.C.R. 928 : (1920) 2 S.C.J. 249 : A.I.R. 1970 S.C. 1955.

R. Krishnaswami and *S.B. Srinivasan*, for Plaintiffs.

T. Raghavan and *T.K. Seshadri*, for Defendants.

The Court delivered the following

JUDGMENT.—This suit is filed for the recovery of Rs. 88,400 together with interest at six per cent. per annum on Rs. 80,000 from the date of the institution of the suit to the date of realisation for the defendants.

*C.S. No. 102 of 1969. 16*th April*, 1974.

2. The plaintiffs entered into an agreement dated 6th March, 1967 with the first defendant (since dead) regarding the sale of 7000 Nos. of equity shares in the capital of the company called "Nadukani Plantations Private Limited" standing on that date in the names of the first defendant and one Thiru A.C. Murali and his family members. The plaintiffs paid Rs. 80,000 towards part payment of the total purchase amount on various dates, including the earnest money of Rs. 10,000 paid on 6th March, 1967. Since the contract fell through, the plaintiffs are suing the defendants to recover the amount paid. During the pendency of the suit, the first defendant died and so his legal representatives have been brought on record as defendants 2 to 6 as per order of Court dated 15th February, 1972 in Application No. 2734 of 1971.

3. The case of the plaintiffs is that the plaintiffs and the first defendant, (since dead) entered into an agreement dated 6th March, 1967, whereby the first defendant agreed to sell 7000 Nos. of equity shares in the capital of the company *viz.*, Nadukani Plantations Private Ltd., standing in the names of the first defendant and one Thiru A.C. Murali and his family members. The shares belonging to A.C.Murali and his family members were pledged with the first defendant. The agreed price of Rs. 2,05,000 was to be paid by the plaintiffs to the first defendant in three instalments *viz.*, Rs. 10,000 to be paid on 6th March, 1967, the date of the execution of the letter of agreement; Rs. 90,000 by 6th April, 1967 and the balance within six months from the date of the agreement. It was further agreed between the parties that on payment of the second instalment, the plaintiffs would be put in possession of the estate by the first defendant. As agreed, the plaintiffs paid Rs. 10,000 on 6th March, 1967, a sum of Rs. 20,000 on 3rd April, 1967 and another sum of Rs. 50,000 on 9th June, 1967, *i.e.*, in all the plaintiffs have paid Rs. 80,000. The plaintiffs further aver that when they tendered a sum of Rs. 45,000 on 12th June, 1967 as asked, the first defendant pleaded his inability to put the plaintiffs in possession of the estate and sought further time for the performance of his obligations. In spite of several demands made by the plaintiffs, the first defendant was not able to perform his obligation and so the plaintiffs did not make the said payment of Rs. 45,000. The first defendant agreed to return the amount of Rs. 80,000 as settled by the parties ; but, curiously enough, the first defendant wrote a letter on 7th July, 1967 (vide Exhibit P-3) to the plaintiffs, stating that the entire sum of Rs. 80,000 had been forfeited. As it was never the intention of the parties that time was of the essence of the contract, the first defendant cannot withhold the payment made. Hence, after issuing a notice of demand on 18th July, 1967, followed by a notice through their lawyer on 5th October, 1967, the plaintiffs have filed this suit, for the recovery of Rs. 80,000 with interest at six per cent. per annum from 5th October, 1967.

4. The first defendant (since dead) has raised several contentions in his written statement. It is stated that A.C. Murali and his family members transferred 3600 fully paid up equity shares and also pledged 3400 equity shares in the said company to the first defendant as security for the due repayment of the sum of Rs. 1,00,000 advanced by the first defendant. Only for the purpose of the discharge of the liability of the said A.C. Murali to the first defendant, this agreement to purchase the 7000 shares was entered into as evidenced by the letter of agreement, Exhibit P-1, to which A.C. Murali was a party and in which he was also a signatory. The plaintiffs were acting as the agents on behalf of the said A.C. Murali and so, without making A.C. Murali a party, this suit is bad for non-joinder of a necessary party. It is further contended that the estate was, to the knowledge of the plaintiffs in the possession of A.C. Murali who was to put the plaintiffs in possession and the first defendant was not aware of the agreement between Murali and the plaintiffs. The first defendant has also stated that the plaintiffs have failed and neglected to pay the second instalment within one month as agreed. Though this defendant has admitted that he had received Rs. 80,000 in total towards the sale amount, he had denied that he asked the plaintiffs to pay a sum of Rs. 45,000 by 12th May, 1967, that the plaintiffs tendered the same and that

the first defendant pleaded his inability to put the plaintiffs in possession of the estate. The first defendant has further contended that time was the essence of the contract and that there was no settlement whereby he agreed to repay the amount. The plaintiffs had committed breach of the agreement, by failing to pay the balance amount in time. The plaintiffs' failure to pay the amount has prevented the first defendant from recovering the amount due to him from the said A.C. Murali by selling the shares to other parties. The defendant thereby sustained loss and the first defendant has reserved his right. Until such loss is ascertained by a sale of the said shares, the plaintiffs cannot seek to recover any amount paid by them to the first defendant. There was no settlement under which the first defendant agreed to return the sum of Rs. 80,000 paid by the plaintiffs. The plaintiffs had made the payment in part discharge of the liability of A.C. Murali to this defendant. The plaintiff's claim, if any, should be against A.C. Murali. The plaintiffs are therefore not entitled to the return of Rs. 80,000 further, there was no contract or agreement to pay any interest thereon. In this connection the first defendant states that the plaintiffs have deliberately failed to mention that even their own letter of 6th March, 1967 contemplated that the earnest money of Rs. 10,000 paid by them on that date could be forfeited in the event of their committing default in making further payment.

5. The plaintiffs have filed a reply statement denying the allegations in the written statement of the first defendant. The plaintiffs have stated that the shares stood in the name of A.C. Murali and therefore A.C. Murali also signed, in token of his having approved the transaction. At no time were the plaintiffs given to understand, nor were they aware, of any transaction between the first defendant and A.C. Murali. The suit contract was between the plaintiffs and the first defendant, under which the first defendant agreed to put the plaintiffs in possession of the estate. The plaintiffs further state that they have nothing to do with A.C. Murali and they never agreed to repay his debt to the first defendant. The first defendant made no *bona fide* attempt to keep up his part of the contract. The first defendant cannot take advantage of his own wrong and claim to forfeit the earnest money.

6. Defendants 2 to 6, who are the legal representatives of the first defendant who died during the pendency of the suit, have filed a written statement, adopting the written statement of the first defendant and putting the plaintiffs to strict proof of their allegations:

The following issues have been set for trial:

1. Whether the suit is bad for non-joinder of Sri A.C. Murali?

2. Is time for payment the essence of the contract?

3. Whether the plaintiffs have defaulted in paying the balance of the amount and have therefore committed breach of contract?

4. Whether the defendant had committed breach of contract?

5. Whether the defendant had agreed to return the amount of Rs. 80,000 to the plaintiffs?

6. Whether the plaintiffs are entitled to refund of Rs. 88,400 as claimed in the plaint?

7. Whether the plaintiffs are entitled to interest on the sum of Rs. 80,000 as claimed in the plaint?

8. To what relief, if any, are the plaintiffs entitled?

On behalf of the plaintiffs, the first plaintiff examined himself as P.W. 1 and marked Exhibits P-1 to P-7. The defendants have placed reliance on Exhibits D-1 and D-2 on their side and no oral evidence has been let in a part from marking these two documents through P.W. 1. *Issue No.* 1. Learned counsel for the defendants strenuously argued that the letter of agreement Exhibit P-1 dated 6th March, 1967 is only a tripartite agreement among the plaintiffs, the first defendant and A.C. Murali and this is evidenced by the signature of A.C. Murali in Exhibit P-1 and that the said A.C. Murali is also a party to this agreement

as its preamble mentions A.C. Murali and the members of his family and that therefore the said A.C. Murali is a proper and necessary party to these proceedings as per Order 1, rule 9, Civil Procedure Code. To substantiate this contention, he relies on Exhibit D-1 dated 25th June, 1967 *viz.*, a copy of the letter addressed to the plaintiffs by one P.M.G. Nair with a copy to the first defendant and A.C. Murali and another, demanding payment of commission, alleging that he negotiated the transaction for the purchase of the estate between the plaintiffs on the one side as buyers and A.C. Murali and the first defendant on the other as sellers. Thus, the question for consideration is whether this suit is bad for non-joinder of A.C. Murali as alleged.

7. A very close scrutiny of Exhibit P-1 would show that Exhibit P-1 has been entered into only between the plaintiffs and the first defendant. Exhibit P-1 is addressed by the plaintiffs to the first defendant and is not at all addressed in the name of A.C. Murali also. The last clause of the letter is 'Kindly confirm this agreement.' The first defendant has signed at the bottom of the agreement with an endorsement 'I confirm the above arrangement'. Though Murali has also signed below the signature of the first defendant it cannot be construed by any stretch of imagination that Murali was also a party to that or has signed the letter Exhibit P-1 confirming the arrangement. If the contention on behalf of the defendants is true, the letter should have been addressed to A.C. Murali along with the first defendant and the endorsement should have been worded as "We confirm the above arrangement". Regarding this aspect, the first plaintiff has deposed that Thiru Murali is not a party to the agreement; but since the first defendant asked Murali to sign in Exhibit P-1 as he also had shares in the estate, Murali also signed. The other document Exhibit P-2, dated 3rd April, 1967 (second letter of agreement) is also addressed by the plaintiffs only to the first defendant. Murali was neither a party to it, nor has he signed in Exhibit P-2 confirming the arrangement. If Murali had been a party to Exhibit P-1, definitely his signature would have been obtained in Exhibit P-2 also. The absence of the name and signature of A.C. Murali in Exhibit P-2 is a telling circumstance that would lead to the only one inference that A.C. Murali was not at all a party to the agreement, but had signed Exhibit P-1 at the request of the first defendant. I accept the argument of Thiru V.P. Raman, learned counsel appearing for the plaintiffs, that A.C. Murali would become a proper and necessary party only if the suit is for specific performance.

8. It is the admitted case of the defendants that the amount of Rs. 80,000 including the earnest money of Rs. 10,000 was paid by the plaintiffs only to the first defendant. No part of the amount had been paid to Murali. Since the suit is only for recovery of the amount paid to the first defendant by the plaintiffs, I hold that A.C. Murali is not a proper and necessary party to the suit. This issue is found against the defendants.

Issue 2.—The subject matter of the purchase in this suit is 7000 Nos. of equity shares in the capital of the company. Section 82 of the Companies Act, 1956 (Central Act I of 1956) says that the shares or other interests of any member in a company shall be movable property. Having regard to the nature of the transaction, the characteristics of the subject matter (equity shares in this suit) and the absence of any evidence to the contrary, it has to be held that the equity shares in the capital of the company are of a highly speculative and volatile character. In *Roberts* v. *Berry*[1], Turner, L.J., is reported as saying:

> "*Time* may be made to be of the essence of a contract, by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, showing the intention of the parties that the contract was to be completed within a limited time."

* * *

The above dictum was applied in *Hare* v. *Nicoll*[2]. The brief facts of the said case were: A dispute arose in relation to an agreement under seal made in February, 1963, whereby the plaintiff agreed to sell the defendant 50000 ordinary shares in a company called Pontinental Limited at

1. (1853) 3 De.G.M. & G., p. 291.
2. (1966) 1 All E.R. 285.

a fixed price. The agreement conferred on the plaintiff an option to repurchase 25000 of the shares for a certain amount on certain terms. The plaintiff gave notice of his intention to repurchase, 25000 of the shares, which was accepted as if the option had been given within the time prescribed. But, he did not pay the price by 1st June, 1963 as stipulated. The defendant gave notice terminating the purchase agreement. So the plaintiff claimed damages for the breach of the agreement covered by the option. The suit was dismissed and the plaintiff filed an appeal. Willmer, L.J. sitting in the Court of Appeal, holding that the plaintiff was not entitled to damages and dismissing the appeal, observed as follows :

> " In the present case, it seems to me that both the nature of the property and the surrounding circumstances call for consideration. As to the nature of the property, the subject matter of the option consisted of shares of a highly speculative nature, liable to considerable fluctuation in value. Even without the assistance of authority, I should have been disposed to say that that itself was a reason for holding that time was of the essence of the contract."

In the same case, Winn, L.J., arriving at the same conclusion, observed:

> " In my judgment where there is a provision for the purchase of shares on payment by a stated date, it is to be presumed, in the absence of any contrary indication, that the parties to such a contract have impliedly stipulated and mutually intended that the time of payment shall be of the essence of the contract."

Further in *Mahabir Prasad Rungta* v. *Durga Datta*[1], it has been held that in commercial transactions, time is ordinarily of the essence of the contract.

In the present suit, the price and time of payment are expressly stated in Exhibits P-1 and P-2. The purchase of shares is commercial in nature. Basing my opinion on the above cited observations, I reject the contention of the plaintiffs that the first defendant, by accepting only Rs. 20,000 and being a party to Exhibit P-2 has waived the condition that time was of the essence of the contract, and hold that time was of the essence of the contract in this suit, because there is a clause in Exhibit P-2 that the same terms and conditions in Exhibit P-1 would continue and thus there is no waiver.

Issues 3 *and* 4.—As per the conditions in Exhibit P-1 dated 6th March, 1967, the plaintiffs agreed to pay Rs. 10,000 as earnest money on the date of the execution of the document and Rs. 90,000 within one month, *i.e.*, by 6th April, 1967, and the balance of Rs. 1,05,000 within six months from that date. The third clause of the agreement is that only on payment of the second instalment of Rs. 90,000 the plaintiffs would be put in possession of the estate.. The fourth clause says that only on the final payment being made, the shares would be transferred either in the names of the plaintiffs or in the names of their nominees. But, the plaintiffs, after paying the earnest money of Rs. 10,000 did not pay the balance of Rs. 90,000 by 6th April, 1967 and instead paid Rs. 20,000 on 3rd April, 1967 and executed another letter of agreement Exhibit P-2 dated 3rd April, 1967, whereby they agreed to pay Rs. 95,000 on or before 6th June, 1967 and the balance of Rs. 80,000 on or before 6th October, 1967 and they were to be put in possession of the estate on payment of Rs. 95,000 as mentioned above. They further agreed that all other terms and conditions mentioned in Exhibit P-1 would continue. P.W. 1 in his evidence, says that he paid only Rs. 50,000 on 7th June, 1967 towards the instalment mentioned in item 1 of Exhibit P-2 and promised to pay the balance of Rs. 45,000 on 17th June, 1967. He has also deposed that when he met the first defendant on 12th June, 1967, on 19th June, 1967 and finally on 30th June, 1967 and paid the balance of Rs. 45,000 asking the first defendant to put them in possession, the first defendant refused to receive the amount and surrender possession of the estate. The plaint contains the following averment in paragraph 3:

> " When the plaintiffs tendered the sum of Rs. 45,000 on 12th June, 1967, the

1. (1961) 1 S.C.J. 569 : (1961) 1 An.W.R. (S.C.) 142 : (1961) 1 M.L.J. (S.C.) 142 : A.I.R. 1961 S.C. 990.

defendant pleaded his inability to put the plaintiffs in possession of the estate and sought further time for the performance of his obligation."

These averments are based on Exhibits P-4 and P-5 *viz.*, the letter and notice sent by the plaintiffs to the defendant. P.W. 1, has not spoken anything in his evidence before this Court, that the 1st defendant pleaded his inability to perform his obligations and sought further time. Exhibit D-2 is the letter written by the plaintiffs to the defendant on 5th July, 1967, demanding repayment of the amount of Rs. 80,000 on the ground that the arrangement to purchase the estate fell through. It is the first letter written by the plaintiffs after the arrangement fell through. In this letter, this is what the plaintiffs have written :

"We are only small business people and we require this amount to roll in our business and as this big amount has been borrowed from several people. I request you to send the amount of Rs. 80,000 by a cheque drawn in favour of A Natarajan at your earliest, to enable us to repay the amount to our creditors"

9. Thus, this document clearly spells out that the plaintiffs were in financial difficulties. In fact, it is quite consistent with the defendant's case that the plaintiffs defaulted to pay the amount as stipulated. To the letter Exhibit D-2, the first defendant had written a reply in Exhibit P-3 dated 7th July, 1967 stating that the plaintiffs had defaulted in paying the balance and completing the transaction in spite of the extension of time agreed to by the first defendant at the request of the plaintiffs, and thereby the plaintiffs had committed breach of contract. It is only after the receipt of Exhibit P-3, the plaintiffs have sent Exhibit P-4, dated 18th July, 1967 and Exhibit P-6 (notice through lawyer) dated 5th October, 1967, wherein they have alleged that it was the first defendant who had pleaded his inability to perform his obligation and sought further extension of time and thereby failed to perform his part of the agreement. If these allegations are really true, they would have been mentioned in Exhibit D-2. The explanation given by them in Exhibits P-4 and P-5 that the letter Exhibit D-2 was written only at the suggestion of the first defendant, is wholly unbelievable. If really the first defendant had made such a suggestion, it is ununderstandable why he should issue Exhibit P-3. It is also significant to note that when the attention of P.W. 1 (first plaintiff) was drawn to these aspects, he has not deposed anything about the first defendant's inability to perform his obligation and his seeking further time or that the letter dated 5th July, 1967 was written at the instance of the first defendant. In response to the notice Exhibit P-5, the first defendant had sent a telegraphic reply Exhibit P-6, followed by a letter of confirmation Exhibit P-7, stating that he was willing to fulfil his obligations in case the plaintiffs were ready to pay the entire balance by the next day with interest at 6 per cent per annum. This was a really a concession given by the first defendant. Even then, the plaintiffs have not sent any reply to Exhibit P-6, expressing their readiness to pay the amount. Under these circumstances, I am of the view that on a true construction of item 2 of clause 2 of Exhibit P-1 and item 1 in Exhibit P-2, the fact of non-payment of the amount according to the times stipulated in the agreement between the parties is practically admitted and therefore it is the plaintiffs who committed the breach of the contracts. Payment of money as stipulated in the agreemnt between the parties is practically admitted and therefore it is the plaintiffs who committed the breach of the contract. Payment of money as stipulated in the agreements is a vital consideration to perform the contract. The fact of non-payment of the amount in this case as agreed speaks for itself. Further, it is the conduct and the defiant attitude of the plaintiffs that were responsible for the breach of the contract. So, I find these issues against the plaintiffs and in favour of the defendants.

10. *Issue* 5.—Regarding the question whether the first defendant had agreed to return the amount of Rs. 80,000 to the plaintiffs, we have got the evidence of P.W. 1 and the averments in Exhibits P-4 and P-5 coupled with the pleadings. P.W. 1 has deposed in his evidence touching this issue, as follows :

"I filed the suit for the return of the money from the defendant, paid by him

under the agreement and also since Mr. Mudaliar (first defendant) had himself agreed to pay the amount."

11. A reading of Exhibits P-4 and P-5 would make it appear as though the first defendant agreed to refund the money on 30th June, 1967. But, immediately after the agreement fell through, the plaintiffs have sent the letter Exhibit D-2 dated 5th July, 1967 for the first time, requesting the first defendant to send back the amount of Rs. 80,000. But in Exhibit D-2 which was written much earlier to Exhibits P-4 and P-5, there is no whisper that the first defendant agreed to return the entire amount. The first defendant also immediately replied by Exhibit P-3, stating that there was no question of repayment at the default was committed by the plaintiffs. In the above circumstances, I hold that the first defendant had not or much less could not have agreed to repay the entire amount of Rs. 80,000. So, this issue is answered in favour of the defendants.

12. *Issues*, 6, 7 and 8.—There is no dispute regarding the quantum of amount received by the first defendant from the plaintiffs. The first defendant's contention in his letter to the plaintiffs and his averment in his written statement is that since the plaintiffs had defaulted in paying the balance and completing the transaction in spite of the extension of time agreed to on their request, the first defendant had been prevented from concluding his offer for the purchase of the said shares and that the failure on the part of the plaintiffs to complete the transaction had caused serious prejudice and loss to him, rendering the plaintiffs liable in damages. Hence the question of repayment of Rs. 80,000 would not arise under the circumstances.

13. At this juncture, it would be pertinent to refer to the terms of the agreement entered into between the parties, to find out the intention of the parties. Clauses 2, 3, 4 and 6 in Exhibit P-1 dated 6th April, 1967 *viz.*, the first document, are as follows:

2. The agreed price of Rs. 2,05,000 will be paid to you as follows:-

(1) Rs. 10,000 (Ten thousand) on the execution of this letter.

(2) Rs. 90,000 (ninety thousand) within one month from this date.

(3) The balance of Rs. 1,05,000 (one lakh five thousand) with interest at 10 (ten) per cent per annum thereon within 6 (six) months from this date.

3. On payment of the second instalment of Rs. 90,000, we will be put in possession of the estate, but we shall not cut any timber without your written permission or disturb the plantation.

4. The shares covered by this agreement will be transferred to our names or the names of our nominees only on the payment of the balance of Rs. 1,05,000 with interest thereon as provided above.

6. In the event of our failing to pay the second instalment of Rs. 90,000 within the time agreed, the earnest money of Rs. 10,000 paid by us will be forfeited.

In the event of our defaulting to pay the balance of Rs. 1,05,000 with interest within the time allowed, we undertake to surrender possession of the estate and also agree to forfeit the earnest money of Rs. 10,000.

It is crystal clear from the above terms that the plaintiffs were given the option of paying the second instalment of Rs. 90,000 by 6th April, 1967 and getting possession of the estate and secondly on payment of the entire balance of Rs. 1,05,000 getting the transfer of the shares either to the names of the plaintiffs or of their nominees as stipulated in clauses 2, 3 and 4. So the plaintiffs were allowed to pay the entire amount in three instalments including the earnest money of Rs. 10,000 which was to be adjusted towards the purchase amount of Rs. 2,05,000. Further this agreement also provides, by a specific clause (clause No. 6) in unequivocal terms, that under two conditions, the earnest money of Rs. 10,000 would be liable to be forfeited, the conditions being (1) that if the plaintiffs failed to pay the second instalment within the time agreed, the earnest money of Rs. 10,000 would be forfeited, and (2) that even in the event of the failure of the plaintiffs to pay the balance with interest thereon the same earnest money of Rs. 10,000 would be forfeited and further the plaintiff should also surrender possession of the

estate. As the plaintiffs have not been put in possession of the property due to the non-payment of the second instalment, there is no question of surrendering possession and only condition No. 1 would be applicable. But the plaintiffs would forfeit only the earnest money of Rs. 10,000 at the maximum. In other words, the first defendant has reserved the right to forfeit the earnest money of Rs. 10,000 only. Neither is there any clause in Exhibit P-1 forfeiting the entire amount; nor could it be inferred on a true construction of the provision of the agreement that the amount of Rs. 80,000 would be forfeited or adjusted towards the alleged liability of A.C. Murali to the first defendant. Moreover, it seems to me, on a consideration of the terms of the agreement, the wording of the recitals in Exhibit P-1 with their fairly plain meaning, the surrounding circumstances and the conduct of the parties, that the intention of the parties was that in the event of the plaintiffs' committing default, the earnest money of Rs. 10,000 alone was liable to be forfeited and not any other amount. Further, even in the second letter of agreement Exhibit P-2, after having agreed for the extension of time for payment of the instalments and thus varying the conditions with regard to the dates and quantum of instalments they have specifically stipulated, by inserting the final clause, that "all the other terms and conditions (in Exhibit P-1) will remain the same." In other words, Exhibit P-2 has to be read along with Exhibit P-1 with regard to the terms of the contract. So, the argument of the learned counsel for the plaintiffs that there is a novation by the execution of Exhibit P-2 and that the clause of forfeiture has no effect, cannot be accepted. There is no novation of the contract. There is only an extension of the time for payment of the instalments and a slight variation with regard to the quantum of instalments.

14. It is averred in the written statement of the first defendant that the plaintiffs were acting as the agent or on behalf of the said A.C. Murali in agreeing to pay the first defendant the said sum of Rs. 2,05,000 and taking over the shares and the plaintiffs have made the payment in part discharge of the liability of A.C. Murali to the first defendant and as such the said amount of Rs. 80,000 will have to be applied in part discharge of such liability. The learned counsel for the defendants also argued, toeing the line with the above said averments in the written statement, that the plaintiffs cannot personally enforce the repayment of the amount paid since they were only the agents of A.C. Murali and so section 230 of the Indian Contract Act operates against the plaintiffs. The defendants have not substantiated their contention satisfactorily by letting in either oral evidence or any other documentary evidence. There is absolutely no shred of evidence to prove that the plaintiffs were acting only as agents for A.C. Murali except the suggestions made to P.W. 1 and the averments in the written statement. Therefore, I find myself unable to accept the argument put forward on behalf of the defendants.

15. Learned counsel for the plaintiffs then argued that in case of forfeiture, the maximum amount that would be liable to be forfeited in this case is only Rs. 10,000 and however, it is also subject to the doctrine of reasonableness. In support of the first part of this contention, the learned counsel cited before me the decision of the Supreme Court in *Shree Hanuman Cotton Mills and another* v. *Tata Aircraft Limited*[1], wherein it has been decided that every deposit made by the purchaser is not liable to forfeiture and only the earnest money is liable to be forfeited. In that case, the price of the aero scrap agreed to be sold by the respondents to the appellants was Rs. 10 lakhs. An advance of Rs. 2,50,000 was paid by the appellants. The balance of Rs. 7,50,000 was agreed to be paid in two instalments. The appellants failed to pay the said balance. Hence, the respondents ultimately forfeited the entire sum of Rs. 2,50,000 which, according to it, was earnest money. The Court held that it was earnest money and, in the peculiar facts and circumstances of the case, held that the amount was liable to be forfeited. While doing so, the Supreme Court distinguished the decision in *Fateh Chand* v. *Balakishan Das*[2]. In the said deci-

1. (1970) 2 S.C.J. 420 : (1970) 3 S.C.R. 127 : A.I.R. 1970 S.C. 1986.

2. (1964) 1 An.W.R. (S.C.) 60 : (1964) 1 M.L.J. (S.C.) 60 : (1964) 1 S.C.R. 515 : (1964) 1 S.C.J. 187 : A.I.R. 1963 S.C. 1405.

sion, an earnest money of Rs. 1,000 was paid to the plaintiff. Again, the buyer had paid another sum of Rs. 24,000 under the contract. There was a clause in the agreement that both the amounts could be forfeited in case of default by the purchaser in completing in transaction. The Court held in that case that only the earnest money of Rs. 1,000 was liable to be forfeited because of the default of the buyer to complete the transaction. The sum of Rs. 24,000 could not be treated as earnest money and therefore the forfeiture clause relating to that amount was not valid. In *Hanuman Cotton Mills' case*[1] the sum of Rs. 2,50,000 was stipulated as the earnest money. While discussing the nature of earnest money, the Supreme Court laid down the following principles:

"(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

These principles were laid down by the Supreme Court after a review of the decisions on the subject. The amount of Rs. 10,000 paid by the plaintiffs to the first defendant, in this case, also satisfied the above conditions and there can be no doubt that it was paid as earnest money. As a matter of fact, the agreement itself described the said amount of Rs. 10,000 only as earnest money. Then the learned counsel for the plaintiffs contended that even the earnest money, in order to be forfeited, should be reasonable, and in support of the said contention, relied upon the decision of the Madras High Court in *Meenakshinada Deikshitar* v. *Murugesa Nadar and another*[1]. In that case, the plaintiff agreed to purchase a land from the defendant and paid a sum of Rs. 225 as advance towards the total purchase price of Rs. 1,537 which advance, in terms of the agreement, was liable to be forfeited in case the sale was not completed within the prescribed time and due to the plaintiff's default. The transaction did not go through and the plaintiff filed a suit for the return of the advance. The defendant solely relied upon the above clause relating to the forfeiture and contended in the lower Court that they were entitled to forfeit the same. It was observed by Ramaprasada Rao, J., that what may be called "advance" may be "deposit" and what may be termed a "deposit" may ultimately be proved to be "advance" and that in either case it was the intention of the parties that governed. Such an intention could be gathered from the express terms of the contract or from conduct and by surrounding circumstances incidental to such a contract. Though the learned Judge approved of the principle that deposit or earnest money is outside the place of section 74 of the Indian Contract Act, he also observed:

"......in a given contract if a sum is paid under the caption of 'deposit' or 'earnest money' or has to be interpreted as such according to the intentions of parties, and is made forfeitable in case of breach, even then Courts have to adjudge the reasonable compensation to which a party would be entitled to, in such circumstances. Such determination of reasonable compensation can be made either in a suit filed by the depositor (purchaser) against the depositee (vendor) or in a suit by the depositee (vendor), complaining of such breach."

The learned counsel laid emphasis on this observation and contended that even the earnest money in order to be forfeited, should be reasonable. In this connection, I find, the Supreme Court in *Hanuman Cottor Mills' case*[2], has also observed thus:

1. (1970) 2 S.C.J. 420 : A.I.R. 1970 S.C. 1986.

1. (1969) 1 M.L.J. 474 : A.I.R. 1970 Mad. 391.

2. (1970) 2 S.C.J. 420 : A.I.R. 1970 S.C. 1986.

"We express no opinion on the question as to whether the element of 'unreasonableness can ever be considered regarding the forfeiture of an amount deposited by way of earnest and if so what are the necessary factors to be taken into account in considering the reasonableness or otherwise of the amount deposited by way of earnest. If the appellants were contesting the claim on any such grounds, they should have laid the foundation for the same by raising appropriate pleas and also led proper evidence regarding the same, so that the respondents would have had an opportunity of meeting such a claim".

In the said case, the appellants never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited was so large that the forfeiture was bad in law. Nor did they raise any contention that the amount of deposit was so unreasonable and therefore forfeiture of the entire amount was not justified. Even though the amount forfeited was Rs. 2,50,000 that is, one fourth of the total purchase price, the Supreme Court held that section 74 was not attracted, because the said amount of Rs. 2,50,000 was specifically agreed to be the earnest money. Thus, though the Supreme Court has ultimately decided that the earnest money should be forfeited, from the above cited passage, it is clear that the Supreme Court was not called upon to decide the question whether the earnest money, in order to be forfeited, should be reasonable or not. It was because the appellants therein never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited was so large that the forfeiture is bad in law. Here also, I need not go into the question whether the amount of Rs. 10,000 paid as earnest money by the plaintiffs would be reasonable if forfeited, because the plaintiffs have not disputed in the pleadings the reasonableness of the earnest money. They have only pleaded that the first defendant committed default. Only now, a contention with regard to the reasonable nature of the earnest money is sought to be raised in the course of the arguments. So, I am not called upon to decide whether the amount of Rs. 10,000 in order to be forfeited, would be reasonable or not.

16. The learned counsel for the defendants relied upon the decision of the Supreme Court in *Maula Bux* v. *Union of India*[1], for the proposition that forfeiture of earnest money under a contract for sale of property, moveable or immoveable, if the amount is reasonable, does not fall within section 74 of the Indian Contract Act. This principle is now well settled. Since the amount of Rs. 10,000 is a reasonable sum, section 74 is not attracted.

17. I was also referred to the observation of Ramaprasada Rao, J., in *Meenakshinada Deikshitar's case*[2], that the vendor who seeks to forfeit the earnest money has to prove the damages sustained by him. That case related to the sale of some land. The vendor had not adduced any proof as to the damage sustained by him. But, this case relates to the sale of shares and the total purchase price under the contract amounted to Rs. 2,05,000. The earnest money is only Rs. 10,000. The first defendant has contended in his written statement that he was not able to sell the shares to others. Hence, the above observation in *Meenakshinada Deikshitar's case*[2], is not applicable to this case. Moreover, since the plaintiffs have not in their plaint questioned the reasonableness of the earnest money to be forfeited, they are not entitled to raise that point at this stage. Anyway, *prima facie* the amount of Rs. 10,000 mentioned in the agreement as earnest money is liable to be forfeited in case of default of this nature. I am also of the view that in cases of this type, where contracts of commercial nature are involved, the vendor may not be able to measure the amount of damages that he may sustain due to the fault of the vendee, and in such cases the earnest money mentioned in the contract has *prima facie* to be taken as reasonable.

18. For the foregoing reasons, I hold that the forfeiture clause, contemplated by the parties, is only with reference to the amount

1. (1970) 1 S.C.R. 928 : (1970) 2 S.C.J. 249: (1970) 2 M.L.J. (S.C.) 61 : (1970) 2 An.W.R. (S.C.) 61 : A.I.R. 1970 S.C. 1955.
2. (1969) 1 M.L.J. 474 : A.I.R. 1970 Mad. 391.

of Rs. 10,000 and therefore, the first defendant was bound to return the amount paid by the plaintiffs *less* Rs. 10,000. Since the plaintiffs have paid Rs. 80,000 the first defendant was liable to return Rs. 70,000. In Exhibit P-5 dated 5th October, 1967 the plaintiffs have claimed the return of the amount with interest at six per cent. per annum from 7th June, 1967. Learned counsel for the defendants contended that the plaintiffs cannot claim any interest on the amount of Rs. 70,000 and in support of that contention, cited the decision of the Supreme Court in *Mahabir Prasad Rungta* v. *Durga Datta*[1]. In that case, interest was not allowed till date of suit, because in that suit the notice issued prior to suit did not specify the sum which was demanded and therefore the Interest Act did not apply. But in this case, the plaintiffs have specifically mentioned the amount and claimed interest at six per cent per annum from a specified date. Hence, the said decision is not helpful to the defendants. In this case, in spite of the notice Exhibit P-5, the first defendant did not return the amount. He also had the benefit of the money till now. The defendants now have the benefit of Rs. 10,000 the earnest money, by way of forfeiture. Hence, I hold that the first defendant was liable to return Rs. 70,000 with interest thereon at six per cent per annum from 5th October, 1967 (as claimed in the plaint) till date of realisation. I find issue, 6, accordingly. In view of my finding on issue 6., no separate finding is necessary on issue 7. Defendants 2 to 6 are the legal representatives of the first defendant. So, they are liable to repay the amount to the plaintiffs, from out of the assets of the first defendant in their hands. Issue 8 is answered accordingly.

19. In the result, there will be a decree in favour of the plaintiffs for the recovery of a sum of Rs. 70,000 with interest thereon at six per cent per annum from 5th October, 1967 till date of realisation and proportionate costs of suit, against the estate of the first defendant in the hands of defendants 2 to 6.

S.J. ——— *Suit decreed partly.*

1. (1961) 1 S.C.J. 569 : (1961) 1 An.W.R. (S.C.) 142: (1961) 1 M.L.J. (S.C.) 142: A.I.R. 1961 S.C. 990.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

P. Subbia Naidu .. *Appellant**

v.

Vellachami Pillai .. *Respondent.*

Malicious prosecution—Suit for damages—Decreed on appeal—Second appeal—Malice not proved—Defendant not liable.

The plaintiff filed a suit for damages against an officer of the Government on the ground of malicious prosecution. The Trial Court dismissed the suit. On appeal, the appellate Court decreed the suit. On further appeal,

Held: No malice had been proved and the concerned proceedings had been taken by the defendant in the course of his duties as an officer of the Government. In view of these, the defendant was properly held not liable to pay damages for malicious prosecution. [*Para.* 4.]

Cases referred to:—

Ramadoss v. *Sanhasi Chettiar*, (1958) M.L.J. (Crl.) 58: (1958) 1 M.L.J. 79; *Stapelay* v. *Annatts*, (1969) 2 All E.R. 1541.

Appeal against the decree of the Court of the Subordinate Judge, Madurai in Appeal Suit No. 149 of 1970, preferred against the decree of the Court of the District Munsif of Madurai Town in Original Suit No. 1338 of 1968.

R. Kumaraswami Pillai, for Appellant.

K. Ramamurthy, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The plaintiff filed the suit against him for recovery of Rs. 1,000 as damages for malicious prosecution. The instances of malicious prosecution relied on by the plaintiff were three in number. The first was in C.C.No. 163 of 1967 on the file of the Additional First Class Magistrate,

*S.A. No. 1110 of 1972. 22nd *September*, 1975.

Madurai for offences under sections 435 and 324, Indian Penal Code. The prosecution in this case was launched by the predecessor-in-office of the defendant. In this prosecution which was continued subsequently by the defendant, the plaintiff was acquitted. The second instance of prosecution was in M.C. No. 592 of 1967. It was to have the plaintiff bound over for good behaviour. No preliminary order was passed as against the plaintiff as contemplated by section 112, Criminal Procedure Code inasmuch as the learned Magistrate came to the conclusion that there were no sufficient materials to proceed against the plaintiff. The action was thus straightaway dropped and the plaintiff was discharged. The third instance of prosecution was in C.C. No. 1206 of 1968 on the file of the Second Class Magistrate, Madurai. That was for an attempt to cut the branches of a drumstick tree and a threat to assault the wife of one Krishnan. In this also, the plaintiff was acquitted. After these acquittals the plaintiff came forward with the suit, contending that the defendant, actuated by malice, had prosecuted him. The trial Court held that malice was not proved and that the prosecutions had been launched on reasonable and probable grounds. The lower appellate Court reversed this judgment and granted the plaintiff a sum of Rs. 100 as damages. This judgment is now challenged by the defendant in the present second appeal.

2. In this appeal, the learned counsel for the appellant submitted that as far as C.C.No. 163 of 1967 is concerned, the appellant had not started the prosecution as the necessary proceedings had been taken by his predecessors. Regarding the other two cases, he pointed out that one of them was taken as directed by the appellant's superior and the other, as a result of a complaint received from a third party. The submission was that the necessary ingredients for malicious prosecution had not been satisfied in the present case and that therefore, the lower appellate Court was not justified in granting a decree for Rs. 100. The learned counsel for the respondent submitted that, though C.C.No. 163 of 1967 was not directly, initiated by the present appellant, still the said case was relied on for the purpose of binding over the plaintiff in M.C. No. 592 of 1967. It was also pointed out that there were discrepancies between the written statement and the actual facts thereby showing that the defendant did not have a proper case to put forward. As regards the prosecution in C.C.No. 1206 of 1968, it was pointed out that the defendant had been trying to take these proceedings, in offences which were of a non-cognizable nature, only because of malice.

3. I have carefully considered the contentions of both sides. In *Ramadoss* v. *Sanhasi Chettiar*[1]. P.N. Ramaswami, J., has succinctly brought out the ingredients to be satisfied in a case of malicious prosecution and they are: (1) the defendant must have prosecuted the plaintiff, that is, instituted the criminal proceeding or certain other proceedings reflecting upon the plaintiff's honour or character; (2) the prosecution must have ended in favour of the plaintiff; (3) the defendant must have prosecuted without reasonable and probable cause; (4) the defendant, in prosecuting, must have been actuated by malice *i.e.*, an indirect and improper motive; and (5) the plaintiff, when the proceedings were other than criminal proceedings, must have suffered special damage, unless the proceedings were such as, from their very nature, were calculated to injure the credit or honour of the plaintiff. In *Stapelay* v. *Annatts*[2], it has been ruled that the burden is on the plaintiff to prove malice and absence of reasonable and probable cause.

4. In the present case, as far as C.C.No. 163 of 1967 is concerned, the defendant had not prosecuted the plaintiff. The prosecution was done by his predecessor-in-office. If he continues a proceeding already instituted, he could not be found fault with. Further, as pointed out by the Courts below, the prosecution in such cases is conducted by the Assistant Public Prosecutor and the Police Officer is not in charge of the case in the sense that he can withdraw it at his will and therefore, the defendant cannot be blamed therefor. Regarding C.C.No. 1206 of 1968, a com-

1. (1958) M.L.J. (Crl.) 58 : (1958) 1 M.L.J. 79 at p. 81.
2. (1969) 2 All E.R. 1541.

plaint had been received from one Krishnan and on the basis of that complaint alone, the defendant had acted. The defendant cannot, therefore, be said to be the person who initiated the prosecution. M.C.No. 592 of 1967 was taken up as a result of an endorsement by an official superior. Thus, in none of these cases, the first ingredient set out above has been satisfied. It is true that the prosecution has ended in favour of the plaintiff. But, that does not, by itself, give him a cause of action. Further in the present case, it cannot be stated that the defendant prosecuted the plaintiff without reasonable and probable cause as shown by the facts stated already. In addition, it is not established that there is any indirect or improper motive on the part of the defendant in attending to these proceedings. Thus, taking the facts into consideration, I am not at all satisfied that the defendant was properly held liable to pay damages for malicious prosecution. I am of the opinion that no malice has been proved and that the proceedings have been taken by the defendant in the course of his duties as an officer of the Government. The second appeal is allowed, the judgment of the lower appellate Court is set aside and that of the trial Court, restored. There will be no order as to costs. No leave.

S.J. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.S. Kailasam, J.*

Kandaswamy Goundar .. *Petitioner**

v.

The Authorised Officer (Land Reforms), Coimbatore .. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), sections 3 (14) (ii) and 21-A—Wife and son inheriting property on the death of husband— Wife's right not recognised by authorised officer—Son found to be in possession of surplus land—Mother not a member of the family of the son—Mother's right is a pre-existing right and her share is to be excluded from son's share.

X died leaving behind him his wife and son. He also left ancestral property as well as separate property. The wife became entitled to a half share in the separate property of her husband along with her son after the Hindu Womens' Right to Property Act, 1937. This was not recognised by the Authorised Officer who determined a surplus in the hands of the son. The wife had also filed a suit against the son to enforce her right which was decreed after the order of the Authorised Officer. An appeal was filed before the Land Tribunal. The Land Tribunal rejected the contention that the decree was only an adjustment of a pre-existing right which the wife had in respect of the properties and dismissed the appeal. On revision filed by the son.

Held: the petitioner herein is the son and his family cannot include his mother. Section 3 (14) (*ii*) of Act LVIII of 1961. cannot be availed of against the petitioner. [*Para.* 3.]

On the death of the father of the petitioner after the Hindu Womens' Rights to Property Act came into force, the petitioner as well as his mother were entitled to a half share each and this position of law was erroneously not recognised by the Authorised Officer. The suit filed by the mother and the decree that ensued only clarified the existing position of law and the rights of parties and did not effect any transfer or partition after the Act came into force. The Authorised Officer, therefore, was in error is including the share of the mother. Since on the facts, the petitioner will be entitled to only about less than ten acres no question of declaration of surplus arises. [*Para.* 3.]

Petition under section 83 of Act LVIII of 1961 praying the High Court to revise the order of the Land Tribunal at Coimbatore, dated 21st December, 1973 and passed in L.T. Appeal No. 798 of 1973 (Ref. No. 19-K/MRI/C Authorised Officer (Land Reforms), Coimbatore.

K. Chandramouli, for Petitioner.

K. Kumaraswami Pillai, Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—This petition is filed by P. Kandaswamy Gounder against whom pro-

*C.R.P. No. 1514 of 1974. *25th September,* 1975.

ceedings were taken by the Authorised Officer (Land Reforms), Coimbatore. By his order dated 20th July, 1973 the Authorised Officer found that Kandaswamy Gounder was possessed of a surplus extent of 3.560 acres. The petitioner in this Court Kandaswamy Goundar objected to the Authorised Officer finding a surplus of 3.560 acres on the ground that his mother Srimathi Ponnammal was entitled to a share in his father's property and the same has to be excluded from his holdings and that the suit filed by his mother against him for declaration of her rights is pending in the civil Court. It may be mentioned that the father of Kandaswamy Goundar and husband of Ponnammal died on 2nd November, 1948. After the Hindu Women's Right to Property Act, 1937 the mother became entitled to half share in the separate property of her husband along with her son. Subsequently the suit filed by the mother was decreed on 12th September, 1973.

2. The reason for rejecting the contention of Kandaswamy the petitioner herein given by the authorised officer as well as the Land Tribunal is that the lands were under the enjoyment of Kandaswamy on 15th February, 1970 and the village account also showed that the lands were in his name and the fact that civil proceedings were pending which were initiated in the year 1973 after the publication of draft statement under section 10 (1) need not be taken into account. The Land Tribunal was of the view that as the preliminary decree in the civil suit was passed after 2nd October, 1970 the preliminary decree will not be valid and the decree passed in favour of Ponnammal on 12th September, 1973 in O.S No. 411 of 1973 cannot be taken note of. The Land Tribunal was of the view that section 3 (14) (*ii*) and section 21-A (*a*) do not indicate that if a person has got a pre-existing right in respect of certain properties and a preliminary decree is passed after the notified date such preliminary decree can be held to be valid. The Land Tribunal rejected the contention that the preliminary decree passed on 12th September, 1973 is only an adjustment of pre-existing right which Ponnammal had in respect of the properties, and that the decree must be held to be valid.

3. The provisions of law that are relied on by the Land Tribunal are sections 3(14) (*ii*) and 21-A (*a*). Section 3 (14) (*ii*) states that 'family' in relation to a person means the person, the wife or husband, as the case may be, of such person and his or her minor grandsons and unmarried grand-daughters in the male line, whose father and mother are dead. In this case, the petitioner herein is the son and his family cannot include his mother. Section 3 (14) (*ii*) cannot be availed of against the petitioner Kandaswamy. The next section that is relied on is section 21-A (*a*). Section 21 relates to ceiling on future acquisition by inheritance, bequest or by sale in execution of a decree. Section 21-A is in the form of a proviso to section 22. Section 22 relates to transfer or partition made on or after the date of the commencement of the Act but before the notified date. It provides that the Authorised Officer may declare any transfer or partition to be void if the transfer or partition was for the purpose of defeating any of the provisions of this Act. Subsequently this section was amended but it is not material to refer to the amendment. Section 21-A which is in the nature of a proviso to section 22 states that under certain circumstances a partition or transfer shall be valid. Section 21-A (*a*) which is relied on by the land Tribunal provides that "Notwithstanding anything contained in section 22 or in any other provision of this Act and in any other law for the time being in force, where, any person has effected by means of a registered instrument a partition of his holding or part thereof such partition shall be valid. In order to avail the benefit of this proviso the partition must be by a registered instrument. But in this case the petitioner Kandaswamy does not rely on any registered instrument of partition. His plea is that in law he was not entitled to 19 acres as his mother is entitled to half of his father's property. The Court below was in error in invoking the provision of section 21-A (*a*). In law, on the death of the father of the petitioner Kandaswamy, after the Hindu Women's Right to Property Act came into force, the petitioner as well as his mother is entitled to half share each and this position of law was erroneously not recognised by the Authorised Officer. The suit filed by the mother and the

decree that ensued only clarified the existing position of law and the rights of parties and did not effect a transfer or partition after the Act came into force. In this view, the petitioner is right in his contention that the Authorised Officer was in error in including the share of his mother. The petitioner will be entitled only to an amount less than 10 acres and therefore no question of declaration of surplus arises.

4. This petition is allowed. There will be no order as to costs.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

S. Sama Iyer and others .. *Appellants**

v.

O.K.K. Appachi Gounder .. *Respondent.*

Specific performance—Agreement of sale—Suit decreed and document of sale eventually executed by Court—Simple money creditor obtaining decree—Sale of properties in execution—Court-auction—Specific performance decree challenged as fraudulent and collusive—Rights of parties.

A stranger is certainly not bound by a judgment obtained by fraud and collusion. [*Para.* 7.]

Even in the case of a private sale until the execution of the sale deed by the vendor the purchaser does not derive any title to the property. The law is clear that in a specific performance suit until the sale deed was executed by the Court on the failure of the defendant to do so the plaintiff did not derive any title to the suit property. The sale by the Court has to be treated as on the same footing as a sale by an individual party inasmuch as the Court executes the sale deed only on behalf of the party. [*Para.* 8.]

Cases referred to :—

Kali Dayal v. *Umesh Prasad*, A.I.R. 1922 Pat. 63; *Tribeni Mishra* v. *Rampujan*, A.I.R. 1970 Pat. 13 ; *Bengal Coal Co., Ltd.* v. *Balmukunda Goenka*, A.I.R. 1955 N.U.C. Cal. 1068; *S. Ramalingam* v. *G. R. Jagadammal*, (1956) An.L.T. 365 : A.I.R. 1957 A.P. 960 ; *Mrs. Christine* v. *K. Uggappa*, A.I.R. 1966 Mys. 299.

*S.A. No. 1098 of 1972. 26*th September*, 1975.

Appeal against the decree of the Court of the (Additional) Subordinate Judge, Erode in Appeal Suit No. 14 of 1970, dated 20th September, 1971 preferred against the decree of the Court of the District Munsif, Gobichettipalayam in O.S. No. 184 of 1967.

S. Somasundaram, for Appellant.

S. Sethuratnam, *T. Somasundaram* and *A. S. Venkatachalamurthy*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. The plaintiffs 1 to 4 are the sons of one Subbier and the fifth plaintiff is the widow. The defendant is the Court auction-purchaser in execution of a money decree against the vendor of Subbier. Subbier died in 1960. The suit properties belonged to the family of one Srinivasa Iyer who was running a bank at Gobichettipalayam. Subbier had transactions with the said Srinivasa Iyer, the banker. The amount of deposit made by Subbier came to about Rs. 9,000 in or about 1958. On 17th October, 1958 Srinivasa Iyer and his eldest son Subbarathnam are alleged to have entered into an agreement for the sale of the suit properties in favour of Subbier for Rs. 9,000. Subbier was said to have been put in possession of the property on that date. Subbier was alleged to have dealt with the land as his own. However, a sale deed was not executed in favour of Subbier till the death of Srinivasa Iyer. His legal representatives were thereafter called upon to execute a sale deed in favour of Subbier. They did not do so. Therefore, the plaintiffs filed O.S. No. 93 of 1961 on the file of the Sub-Court, Erode, for specific performance of the agreement against the legal representatives of Srinivasa Iyer. The defendants in that suit remained *ex parte* and there was a decree for specific performance on 17th February, 1962. Two months' time was given for execution of the sale deed by the defendants. As the defendants in O.S. No. 93 of 1961 failed to

execute the sale deed even in pursuance of the decree, the sale deed was actually executed by the Court on 16th December, 1966.

2. It appears that a simple money creditor of Srinivasa Iyer filed a suit O.S. No. 72 of 1961. He attached the properties during the pendency of the suit and brought to sale the plaint sschedule properties in execution of the decree in O.S. No. 72 of 1961. The defendants purchased the properties in the said Court-auction on 4th March, 1965. The sale was confirmed by Court on 8th July, 1965. As the Court-auction-purchaser began to interfere with the plaintiffs' rights to the properties, the plaintiffs came forward with a suit for a declaration and permanent injunction or alternatively for possession of the suit properties.

3. The Court-auction-purchaser who was impleaded as the defendant contested the suit. He claimed that the alleged agreement of sale on 17th October, 1958 in favour of Subbier was an antedated one and not supported by any consideration. He disputed the claim of the plaintiffs that Subbier was put in possession of the plaint schedule properties. He submitted to the Court that the decre in the specific performance suit O.S. No. 93 of 1961 was the result of a fraudulent and collusive transaction between the families of Subbier and Srinivasa Iyer. It was also pointed out that the properties described in the agreement (Exhibit A-1) were not the suit properties that the agreement did not avail the plaintiffs. It was therefore submitted that the plaintiffs were not entitled to the declaration and injunction or possession prayed for.

4. The learned District Munsif held that the agreement for sale under Exhibit A-1 and the decree in O.S. No. 93 of 1961 were valid and that they had not been obtained fraudulently or collusively. He further held that the plaintiffs had got title to the suit lands as owners of the suit lands and that they would be entitled to possession thereof. In view of the fact that the suit lands were in the enjoyment of cultivating tenants, he held that the plaintiffs were not entitled to actual possession. He found that the defendant was in possession of the suit lands by leasing them out to tenants and that therefore, the plaintiffs would not be entitled to permanent injuncion. He decreed the suit for declaration and for possession with costs.

5. On appeal by the defendant, the learned Subordinate Judge found that the plaintiffs had not proved that the suit property was covered by Exhibit A-1. He found that the agreement, dated 17th October, 1951 between Subbier and Srinivasa Iyer and his eldest son was neither true, nor valid, nor supported by consideration and that the decree obtained in O.S. No. 93 of 1961 was the result of fraudulent conduct and collusion between the plaintiffs and the heirs of Srinivasa Iyer in that suit. He also held that the plaintiffs were not entitled to declaration and injunction or possession as prayed for.

6. The present appeal has been filed by the plaintiffs who had lost in the lower appellate Court. The main effort of the learned counsel for the appellants was to show that the defendant derived his title from Srinivasa Iyer and that therefore, he is bound by the proceedings in O.S. No. 93 of 1961. It was also submitted that under Exhibit A-1 and/or under the decree in O.S. No. 93 of 1961, the plaintiffs had become entitled to the suit properties and that the defendant who derived his title through Srinivasa Iyer is bound by the decree against Srinivasa Iyer himself. For the proposition that the Court-auction-purchaser was a representative of the judgment-debtor the learned counsel cited the decision in *Kali Dayal* v. *Umesh Prasad*[1]. It was ruled in that case by a Bench of the Patna High Court that "The auction-purchaser is the representative of the judgment-debtor and seems to be on the same footing as the person claiming under him." It was pointed out therein that a person claiming through or under another when he derived his title through that other either by assignment, inheritance, or succession or when he held a subordinate title granted by the other, he could have no better title than the person through or under whom he claimed. It was also held that the provisions of section 11 of the

1. A.I.R. 1922 Pat. 63.

Civil Procedure Code, applied to such cases. If the decree was a valid decree, then in view of the ruling the defendant would be bound by the decree in O.S. No. 93 of 1961. The question is whether the said decree was a valid one and binding on the defendant.

7. Learned counsel for the respondent drew my attention to the provisions of section 44 of the Evidence Act and relied on the decision in *Tribeni Mishra* v. *Rampujan*[1], in support of the proposition that a decree or order can be challenged on ground of fraud in a collateral proceeding without any suit for setting aside the decree, irrespective of the time when the judgment was delivered or order or decree was passed. Section 44 of the Evidence Act provides that " Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 43, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was *obtained by fraud or collusion.*" (*italics* by me). It is this provision which was construed by the Patna High Court in the case cited. The relevant passage in paragraph 13 which is found extracted in the head note is as follows : " The right as given by section 44 has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing a regular suit for the purpose. A decree or order can be challenged on ground of fraud in a collateral proceeding without any suit for setting aside the decree irrespective of the time when the judgment was delivered or order or decree was passed." In *Bengal Coal Co. Ltd.* v. *Balmukunda Goenka*[2], a Bench of the Calcutta High Court has pointed out. " The plea of *res judicata* pre-supposes that there is a decree or judgment which has legal existence or validity. If the decree is a nullity and non-existent in the eye of law, no plea of *res judicata* can *be founded upon* it, the defendant in *the* suit in which the decree was passed, just as much as any stranger to the suit, being free under section 44 of the Evidence Act to show that it is so." (*italics* by me). The Calcutta High Court has in this connection considered the impact of section 11, Civil Procedure Code, also. Unfortunately a fuller text of the judgment is not available. But the principle laid down therein is to my mind quite clear that a stranger is certainly not bound by a judgment obtained by fraud and collusion and I would adopt with respect the principles set out above. The result is that it is possible for the defendant here to show that the earlier proceedings between the legal representatives of Subbier and the legal representatives of Srinivasa Iyer were merely collusive or fraudulent. The fact that the heirs of Srinivasa Iyer remained *ex parte* in the said proceedings is tell-tale. From the fact that the heirs of Srinivasa Iyer remained *ex parte* in the said proceedings. I am satisfied that the said proceedings were only collusive and were initiated with some ulterior motive. Whether a judgment was obtained by fraud or collusion is a question of fact. I see no reason to disturb the finding on such a point of the lower appellate Court on this point.

8. Even assuming that the said decree was not the result of collusion, still I may examine the position whether the plaintiffs have obtained any right in respect of the suit property prior to the defendant's purchase under the Court auction. The suit O.S.No. 93 of 1961 was filed in 1961, for specific performance. The decree was passed on 17th February, 1962. There was time for two months for executing the sale deed. The legal representatives of Srinivasa Iyer did not do so. Thereafter, a sale deed was executed by the Court only on 16th December, 1966. The question is whether the rights of the plaintiffs started from the passing of the decree or from the execution of the sale deed. On this point, there are two authorities. Even in the case of a private sale until the execution of the sale deed the purchaser does not derive any title to the suit property. It was held by Viswanatha Sastri J., in *S. Ramalingam* v. *G. R. Jagadammal*[1], that "in view of section 54 of the Transfer of Property Act there is no room for the contention that the purchaser becomes in equity the

1. A.I.R. 1970 Pat. 13.
2. A.I.R. 1956 N.U.C. Cal. 1068.

1. (1956) An.L.T. 365 : A.I.R. 1957 A.P. 960.

owner of the estate under the contract of sale and the vendor holds the property in trust for him." Assuming that Exhibit A-1 was a genuine document, the plaintiffs cannot trace their rights back to 1958 as until they got the sale deed in their favour; there was no question of the property in equity vesting in them. With reference to the Court auction, the Mysore High Court in *Mrs. Christine* v. *K. Ugappa*[1], has pointed out that the transfer by Court on behalf of the judgment-debtor has all the characteristics of transfer *inter vivos*, and title passes with the execution and registration of the sale deed and does not flow from decree. All the earlier cases on the point including the decision of the Andhra Pradesh High Court cited above have been reviewed in that case. The law is therefore clear that until the sale deed was executed by the Court the plaintiffs did not derive any title to the suit property. The Court executed the sale deed only on 16th December, 1966. But the Court auction had already been held on 4th March, 1965 and the sale had been confirmed on 8th July, 1965. As pointed out by the learned counsel for the respondent, the whole proceedings for the purpose of getting the sale deed executed in favour of the plaintiffs through the Court appear to have manoeuvred only to get over the Court-auction sale. However, it is unnecessary to go into this point any further. Even assuming that the plaintiffs had got any right under the specific performance suit, still the sale in favour of the plaintiffs would be effective only from 16th December, 1966. As the property had already been sold by Court, the plaintiffs cannot derive any title under the sale deed executed by the Court. The sale by the Court has to be treated on the same footing as a sale by an individual party as the Court executes the sale deed only on behalf of the party. As the heirs of Srinivasa Iyer could not have conveyed the property in favour of the plaintiffs after the Court-auction similarly, the Court also could not have conferred title on the plaintiffs by executing a sale deed after the Court auction. There was no title of Srinivasa Iyer or his heirs to be conveyed. Therefore, there are no merits in the appeal filed by the plaintiffs. It is therefore dismissed. The respondent will be entitled to his costs. No leave.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

Sivan Pillai .. *Appellant**

v.

Anbayyan and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 2— Suit on mortgage—Preliminary decree passed—Failure of mortgagor to pay the amount —Application under Order 34, rule 5 for sale of the property after 3 years—Whether barred by limitation—Limitation Act (XXXVI of 1963), Article 137.

Order 34, Civil Procedure Code, itself expressly contemplates the passing of a final decree as the only method of terminating a suit in which a preliminary decree had already been passed. [*Para.* 4.]

Under the rules of Order 34, the Court is bound to fix a date within the outer limit of 6 months for the mortgagor to pay the amount in question. The Court's failure to do so cannot mean that the time begins to run from the date of the decree itself. If the Court failed to discharge its duty, the general principle is that no litigant should suffer as a consequence of the failure of the Court or the mistake committed by the Court.

[*Paras.* 7 *and* 9.]

In the instant case, an I.A. under Order 34, rule 5 of Civil Procedure Code was filed beyond 3 years after the passing of the preliminary decree which was not in accordance with Order 34 The defendant pleaded the bar of limitation.

Held : The second plaintiff-appellant would be entitled to a final decree for the sale of the property as prayed for in the I.A. [*Para.* 10.]

Cases referred to:—

Angammal v. *Muhammad Sulaiman Lebbai*, (1945) 2 M.L.J. 239 : 58 L.W. 492 : A.I.R.

1. A.I.R. 1966 Mys. 299.

*S.A. No. 1947 of 1972. 8*th December*, 1975

1946 Mad. 38 ; *Qazi Ghulam Amir* v. *Mt. Masuda Khatum and others*, A.I.R. 1943 All. 321.

Appeal against the decree of the Court of the Subordinate Judge, Padmanabhapuram in Appeal Suit No. 379 of 1970, preferred against the decree of the Court of the District Munsif (Principal) of Padmanabhapuram in I.A. No. 126 of 1969 in O.S. No. 635 of 1957.

P. Anantha Krishnan Nair, for Appellant.

S. Padmanabhan, for Respondents.

The Judgment of the Court was delivered by

Ismail, J.—The second plaintiff in O.S. No. 635 of 1957 on the file of the Court of the principal District Munsif, Padmanabhapuram who lost before the Courts below, is the appellant herein. The suit was instituted by the predecessor-in-interest of the appellant herein and during the pendency of the suit, he having died, the appellant herein was brought on record as his legal representative and as the second plaintiff to prosecute the suit. The suit was to enforce a mortgage and a preliminary decree was passed on 30th January, 1958. Thereafter, in 1969, the appellant filed I.A. No. 126 of 1969 purporting to be under Order 34, rule 5 of the First Schedule to the Code of Civil Procedure for passing a final decree for the sale of the property. Admittedly, the amount decreed had not been paid by the respondents herein. The respondents put forward the contention that, since the preliminary decree was passed on 30th January, 1958 and since the application in I.A. No. 126 of 1969 was filed after the expiry of 3 years from the date of the decree, the said application was barred by limitation. The Courts below accepted this contention of the respondents herein and dismissed the application filed by the appellant. Hence the present second appeal by the applicant in I.A. No. 126 of 1969 who was the second plaintiff in O.S. No. 635 of 1957.

2. The only question for consideration is whether the said I.A. filed by the appellant herein can be said to be barred by limitation.

3. Admittedly, in this case the preliminary decree, dated 30th January, 1958 was not passed in accordance with the provisions contained in Order 34 of the First Schedule to the Code of Civil Procedure. Order 34 of the First Schedule to the Code of Civil Procedure deals with suits relating to mortgages of immovable properties. That order covers all types of suits in relation to a mortgage, such as, a suit by the mortgagee for recovery of the money or for sale of the property or for foreclosure. Equally, it deals with a suit by the mortgagor for redemption. In different rules of that Order specific provisions have been made as to the manner in which a suit on a mortgage can be disposed of depending upon the question whether the suit was for an enforcement of a mortgage by way of foreclosure or sale or whether it was a suit for redemption by the mortgagor. All that is necessary for the purpose of the present second appeal is to point out that the said Order contemplates the disposal of the suit in two stages by passing a preliminary decree in the first instance and passing a final decree ultimately. With regard to each one of the types of the suits referred to already, the Order itself indicates what should be the contents of the preliminary decree as well as the final decree. As far as the present case is concerned, we are concerned with a suit for the enforcement of a mortgage by the sale of the mortgaged property. Order 34, rule 4 (1) dealing with a preliminary decree in a suit for sale states that the Court shall pass a preliminary decree to the effect mentioned in clauses (*a*), (*b*) and (*c*) (i) of sub-rule (1) of rule 2, and further directs that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale, after deduction therefrom of the expenses of the sale, be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same. Rule 2 (1) of Order

34 deals with a preliminary decree in a suit for foreclosure and states that :—

"In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(*a*) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of the suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him upto that date in respect of his mortgage security, together with interest thereon ; or

(*b*) declaring the amount so due at that date ; and

(*c*) directing :—

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (*a*), or from the date on which such amount is declared in Court under clause (*b*), as the case may be and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property and shall, if so required, retransfer the property to the defendant at his cost, free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him or where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property.

A combined reading of Order 34, rule 2 (1) clauses (*a*), (*b*) and (*c*) (i) and rule 4 (1) in so far as a suit relating to enforcement of a mortgage by the sale of the mortgaged property is concerned, will involve (*i*) the Court passing a preliminary decree ordering that an account be taken of what was due to the plaintiff on the date of such decree for the principal and interest on the mortgage ; (*ii*) or declaring the amount so due at that date ; (*iii*) directing that if the defendant pays the amount into Court so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (*a*), or from the date on which such amount is declared the Court under clause (*b*) ; and (*iv*) directing that, in default of the defendant paying as therein mentioned within the time prescribed, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or sufficient part thereof be sold and also the manner in which the proceeds of the sale should be applied. Form No. 5 in Appendix D to the Code of Civil Procedure gives the form of preliminary decree for sale under Order 34, rule 4 where accounts are directed to be taken and Form No. 5 A of the same Appendix gives the form of preliminary decree for sale under Order 34, rule 4 when the Court declares the amount due. Clauses 2 and 3 of this Form are as follows and they incorporate the provisions contained in Order 34, rule 4 read with rule 2, Civil Procedure Code.

"2. And it is hereby ordered and decreed as follows :—

(*i*) that the defendant do pay into Court on or before the....day of.....or any later date up to which time for payment may be extended by the Court, the said sum of Rs......

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order 34, of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in

the plaint mentioned and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required reconvey or retransfer the said property free from the said mortgage and clear of and free from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall if so required, deliver up to the defendant quiet and peaceable possession of the said property."

"3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property."

In the present case, admittedly the preliminary decree that was passed on 30th January, 1958 has not been in terms of Order 34, rule 4 as well as Form 5-A of Appendix D to the Code of Civil Procedure. Under these circumstances, the question for consideration is whether the application filed by the appellant herein in 1969 for passing a final decree can be said to have been barred by limitation at all.

4. Before I deal with this question, I may straightway mention certain admitted and well-settled principles. Not merely a suit on a mortgage, but also a partition suit as well as a suit for dissolution of partnership and accounts involve the passing of a preliminary decree in the first instance and thereafter a final decree. Another principle that has been settled is that an application for passing a final decree in the suits mentioned above is not an application in execution of the decree; but it is only an application in a pending suit. Thus, it is clear that the passing of a preliminary decree, does not terminate the suit and notwithstanding the preliminary decree, the suit is pending and the suit is terminated or comes to an end only by the passing of the final decree. A perusal of the various rules contained in Order 34 makes it clear that whatever the nature of the suit on a mortgage, in every suit that Order contemplates the passing of a preliminary decree in the first instance and thereafter the passing of a final decree. Therefore, it is clear that Order 34 itself expressly contemplates the passing of a final decree as the only method of terminating a suit in which a preliminary decree has already been passed. As far as the suit for partition is concerned, it has been held by several decisions that there is no period of limitation for the application for passing a final decree. Similarly, an application for passing of a final decree in a suit for dissolution of partnership and accounts is also not governed by any period of limitation. However, as far as a suit on a mortgage is concerned, it has been held by Courts in this country that Article 181 of the First Schedule to the Limitation Act, 1908, corresponding to Article 137 of the Schedule to the Limitation Act, 1963, applies to an application for the passing of a final decree. In this case, the application was for passing a final decree directing the sale of the property, on default committed by the mortgagor in paying the amount mentioned in the preliminary decree. Article 137 of the Schedule to the Limitation Act, 1963, reads as follows:—

"137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues."

Thus, it is clear that this is a residuary Article not specifically dealing with an application for the passing of a final decree in a mortgage suit and it is by interpretation of Courts that this Article has been held to apply to an application for the passing of a final decree. The period of limitation commences, under the terms of the entry in the third column, when the right to apply accrues, namely, in the case of an application for the passing of a final decree directing the sale of hypotheca, from the date fixed for payment of the mortgage amount in the preliminary decree, if within the time so fixed, the defendant does not pay the amount. Within the period of

3 years from that date, if the application, for passing a final decree is not filed, it has been held that such an application will be barred by limitation. It is too late in the day for questioning the correctness of the view that Article 181 of the old Limitation Act or Article 137 of the new Limitation Act will apply to such an application though it does not appear that a particular feature peculiar to suits of this nature has been considered in the past. As I pointed out already, whether it is a suit for partition or a suit for dissolution of partnership and accounts or a suit on a mortgage, the suit does not terminate on the passing of the preliminary decree, but terminates only on the passing of the final decree. In a suit on a mortgage, after the passing of the preliminary decree, if the decree-holder-plaintiff does not apply for the passing of a final decree within the period prescribed by Article 181 of the old Limitation Act or Article 137 of the new Limitation Act and on that ground the said application is dismissed as barred by limitation, what happens to the pending suit itself does not appear to have been considered so far. I gave an opportunity to counsel on both sides to draw my attention to any decision which has considered this aspect to the matter; but the learned counsel on both sides represented to me that they were not able to came across any decision which has considered this question. If the analogy of the partition suit is taken, once a preliminary decree declaring the shares of the parties has been passed, that suit is said to be pending till a final decree is passed. And there being no period of limitation prescribed for filing an application for final decree in such a suit, the suit will be pending till a final decree is actually passed and there is no compulsion on any of the parties to the preliminary decree to apply for a final decree within a particular time. This situation has been actually taken into account by this Court in framing the Civil Rules of Practice and Circular Orders. In Rule 26, it is stated :—

> "26. *Proceedings not to be adjourned* sine die *or struck off the file.*—No suit, appeal, matter, or proceeding, shall, under any circumstances whatever, be adjourned *sine die* or struck off the file; and if, by inadvertence, a day certain for the further hearing is not fixed by the Court, or a case is ordered to be struck off the file, the case shall be posted and come on for hearing one month from the day on which it was before the Court, or, if the Court is then closed, on the next day thereafter on which the Court is sitting :
>
> Provided that in a suit for partition in which a preliminary decree has been passed the Court may adjourn the proceedings *sine die*, with liberty to any of the parties to whom shares have been allotted to apply for the passing of a final decree."

Therefore, with regard to a suit for partition, once a preliminary decree has been passed, it has to be adjourned *sine die* with liberty to any of the parties to whom shares have been allotted to apply for the passing of a final decree. If the parties to whom shares have been allotted under the preliminary decree do not apply for the passing of a final decree within a reasonable time, the Code does not confer a power on the Court to dismiss that suit on the ground that nobody has applied for the passing of the final decree, either *suo motu* or on the application of any one of the parties to the suit. So also even though Order 34 of the First Schedule to the Code of Civil Procedure elaborately deals with the manner of disposal of a suit on a mortgage, it does not contain any provision for dismissing a suit on a mortgage in which a preliminary decree has been passed already, on the ground that the decree-holder had not applied for the passing of a final decree within the time prescribed by law, either *suo motu* or on the application of the judgment-debtor. As a matter of fact, once the application made by a decree-holder for passing a final decree is dismissed on the ground that it is barred by limitation, we are left with a peculiar and nebulous position of the suit being still pending and the preliminary decree already passed not having been cancelled; but at the same time, the decree-holder in the suit not being able to realise the fruits of the decree which he obtained under the preliminary decree. I may also mention in this context that even

though Order 34, rule 2 (1) read with rule 4 (1), Civil Procedure Code contemplates a Court fixing a date within 6 months before which the amount determined by the Court or declared by the Court should be paid by the mortgagor, at every stage, there is provision in that Order itself for extending the time so fixed. As a matter of fact, even in a case where a sale has already been ordered and has been held, there is a provision for payment of the amount due by the mortgagor before the confirmation of the sale. All these may indicate that the judgment-debtor has an opportunity of paying the amount not merely within the time prescribed under Order 34, rule 2 (1) read with rule 4 (1), Civil Procedure Code or within the extended time, but also even before the confirmation of the sale itself.

5. It is these features that are present in Order 34, which had been considered by Somayya, J., in *Angammal* v. *Muhammad Sulaiman Lebbai*[1]. In that case, a preliminary decree for redemption of a usufructuary mortgage was passed on 15th October, 1935, and the time fixed for payment was 15th January, 1936. The plaintiff who was the mortgagor did not deposit the amount by the date fixed, nor did she ask for extension of time under Order 34, rule 7 (2) of the Civil Procedure Code. She deposited the amount towards the end of 1942 and then applied under Order 34, rule 8 of the Code asking the Court to pass a final decree with a direction to the defendant to deliver the mortgaged property to her. Somayya, J., held that she was entitled to the remedy asked for by her in the petition and th. outer limit beyond which payment under rule 8, sub-rule (1) cannot be made, is the passing of a final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under rule 8 (3) of Order 34 of the Code. The learned Judge also stated that the mortgagor was not bound to take out an application within three years of the time for payment fixed by the preliminary decree and that she was entitled to deposit the amount so long as the final decree was not passed.

1. (1945) 2 M.L.J.239: 58 L.W.492 : A.I.R. 1946 Mad.38.

In the course of his judgment, the learned Judge stated :—

" Even if we take it that in the case of a decree for redemption of a usufructuary mortgage, the defendant has no right of asking the suit to be dismissed for non-payment by the mortgagor of the amount decreed the suit will have to be considered to be pending and the mortgagor will have the right of paying the amount at any time. As I pointed out above, in the case of a mortgage by conditional sale, if after a preliminary decree for redemption, the mortgagor does not pay and the mortgagee does not ask for final decree for foreclosure within the time available to him, the result may be that the suit should be considered to be pending as it has been properly terminated. In that case the mortgagor would have the right of payment at any time under rule 8 (1). Similarly in cases where the defendant-mortgagee can ask for a final decree for sale. I do not see therefore any substance in the argument based on the possibility of payment at any time. This may be no doubt very inconvenient. But the Legislature has not provided that the suit may be terminated if neither the mortgagor nor the mortgagee obtained a final decree. The Privy Council has ruled that in a case of a preliminary decree for partition the suit cannot afterwards be dismissed for non-prosecution and must be kept pending. The same result may follow in cases of redemption suits where after a preliminary decree, no action is taken by the parties. It may well be that as the rights of the parties are declared by the preliminary decree, the suits cannot be dismissed for non-prosecution.

" Whatever that may be, so long as the suit is pending, the mortgagor has the right expressly given to him under rule 7 (2) and under rule 8 (1) of Order 34, Civil Procedure Code. The whole scheme of Order 34, Civil Procedure Code, is to give the mortgagor an opportunity of getting the time fixed in the preliminary decree for payment of the amount extended. In case of suits by the mortgagee for foreclosure or

sale, provision is made for such extension at the instance of the mortgagor on his showing good cause. Rule 2 (2) provides for such extension in a suit for foreclosure. Rule 4 (2) provides for similar power in a suit for sale. Without the necessity of showing good cause; the mortgagor is also given by rule 3 opportunity of paying the amount decreed at any time before a final decree debarring the defendant from all right to redeem the mortgaged property is passed. Similarly in suits for sale the code goes further and rule 5 provides that such payment may be made at any time before confirmation of a sale held in pursuance of a final decree for sale.

"Likewise in suits for redemption filed by the mortgagor we have rule 7 (2) corresponding to rule 2 (2) and rule 4 (2) enabling the plaintiff-mortgagor of getting an extension of time on showing good cause at any time before a decree for foreclosure or sale is passed. Again rule 8 (1) provides just as rules 3 and 5 that before a final decree debarring the mortgagor of all right to redeem the property is passed or before the confirmation of a sale held in pursuance of a final decree for sale passed under rule 8 (3) (*b*), the mortgagor may make the payment and that without the necessity of showing good cause. There can be no doubt that these double opportunities given by the Legislature were available to mortgagors suing for redemption of a usufructuary mortgage also prior to 1st April, 1930. Under the rules of Order 34, as they then stood, in a suit for redemption of a usufructuary mortgage, the defendant-mortgagee could; in case of non-payment by the plaintiff-mortgagor, ask for a final decree for sale. Why this was omitted it is difficult to see. Anyway while omitting the right of a usufructuary mortgagee to ask for a final decree for sale, the Legislature left rules 7 (2) and 8 (1) as they stood. There is no intelligible or apparent reason why, only in the case of redemption of a usufructuary mortgage, the mortgagor should not have the right of getting an extension even by showing good cause under rule 7 (2) or without showing any cause under rule 8 (1). Under the Code as it stood prior to 1st April, 1930, both rules 7 (2) and 8 (1) applied to cases of usufructuary mortgagees because a final decree for sale was expressly granted to a usufructuary mortgagee defendant in a suit for redemption of such a mortgage".

I have extracted *in extenso* from the judgment of Somayya, J., only for the purpose of showing the scope of the various rules contained in Order 34 as well as for pointing out that once a preliminary decree is passed, the application for passing a final decree is an application only in a pending suit and the Code itself has not provided for the dismissal of that suit after the passing of the preliminary decree on the ground that the decree-holder had not applied for a final decree. The general question, when a preliminary decree has been passed, the suit is still pending and there is no provision in the Code of Civil Procedure for dismissing the suit after the preliminary decree on the ground that the decree-holder has not applied for the passing of the final decree, whether there is any justification at all for applying any Article prescribing a particular period of limitation in the Limitation Act, to an application for passing a final decree, since the failure to apply for the passing of the final decree within the time prescribed by the Article does not terminate the suit, but only produces the anomalous situation of there being a fruitless preliminary decree and the suit itself pending permanently may have to be considered at the appropriate level. It is against the above background, I propose to consider the question that arises in the present case.

6. It is admitted that there is no direct authority of this Court on this point. The only direct authority which is available in this case is that of the Allahabad High Court in *Qazi Ghulam Amir v. Mt. Masuda Khatum and others*[1]. In that case, a preliminary decree fixed neither the amount due nor the date within which it should be paid. Under those circumstances, the question that arose for consideration was whether the application for passing a final decree can be said to have been barred by limitation under Article 181 of the Limitation Act, 1908.

1. A.I.R. 1943 All. 321.

The Allahabad High Court pointed out that in the absence of a date fixed for payment of the amount, it could not be said that there had been a default in the payment which was a condition precedent for the accrual of a right to apply for final decree, *vide* rules 4 and 5 of Order 34 and paragraph 3 of Form No. 5-A, Appendix D to First Schedule of the Code. The Court proceeded to state:—

> "It seems to us perfectly clear that a decree-holder can apply for a final decree only when there has been a default on the part of the judgment-debtor in the payment of the amount specified in the preliminary decree by the date specified therein. It follows that where no amount is specified and no date is fixed it is not possible for the decree-holder to say that there has been a default by the judgment-debtor in payment as directed by the decree. As we have pointed out above, the blank spaces in the printed form in the decree in question were not filled up. The result was that no amount was mentioned and no date was fixed. In these circumstances, we have no hesitation in accepting the contention of the respondent's learned counsel that time never began to run against Mt. Masuda under Article 181, Limitation Act, for the making of an application for the preparation of a final decree."

7. Mr. S. Padmanabhan, the learned counsel for the respondents conceding that this is the only direct decision available on the point and that decision is in favour of the contention of the appellant, contends that the fixing of a date within which the amount should be paid is not mandatory under the provisions of Order 34 of the Code, and, therefore, it cannot be contended that the right to apply for the passing of the final decree had not accrued in this particular case. According to the learned counsel, when the Court does not fix the time within which the amount should be paid, then the time begins to run from the date of the decree itself. I am unable to accept this argument. The provisions of Order 34 repeatedly refer to the default to pay the amount within the date fixed or the extended time and, therefore, there is no scope for the argument that when the Court fails to fix the date within the outer limit of 6 months mentioned in the rules of Order 34 the period of limitation under Article 181 must be deemed to have commenced from the date of the decree itself.

8. Mr. Padmanabhan, the learned counsel for the respondents, then contended that in a case where against a preliminary decree, an appeal has been preferred and the appeal is dismissed, then it has been held that the time begins to run from the date of the appellate decree itself and if that analogy is applied, in this case also, the time must begin to run from the date of the preliminary decree. I am unable to accept this argument either. Where the appeal is preferred against the preliminary decree and the appellate Court dismisses the appeal, the appellate Court will have to necessarily fix a fresh date within which the losing party will have to pay the amount, because by the time the appeal is disposed of, the date fixed by the original Court in the preliminary decree would have already passed. Only in the event of the appellate Court not fixing any date, the Courts have held that the time will begin to run from the date of the appellate decree itself. There is no analogy between this situation and the situation resulting from the trial Court itself failing to fix a date for payment of the money as contemplated by the various provisions contained in the rules of Order 34. In view of this position, I hold that the application for final decree made by the appellant in this case was not barred by limitation.

9. I may also point out certain general considerations which also favour the view I have taken in favour of the appellant. I have said enough already to show that under the rules of Order 34, the Court is bound to fix a date within the outer limit of 6 months for the mortgagor to pay the amount in question. If the Court fails to discharge its duty, the general principle is that no litigant should suffer as a consequence of the failure of the Court or the mistake committed by the Court. Secondly, it would have certainly been open to the appellant herein to apply for amendment of the decree to the trial Court, so that the decree could be made in conformity with the requirements of Order

34 as well as Form 5-A already referred to. It is conceded that for applying for amendment of the decree, there is no period of limitation whatever. Therefore if the appellant had first applied for an amendment of the decree and had got the decree amended and thereafter, on default committed bythe respondents herein to pay the amount within the date fixed by the amended decree, made the application for passing the final decree, it could not be said that the present application filed by the appellant herein was barred by limitation. These considerations also will support the view taken by the Allahabad High Court already referred to and therefore, looked at from any point of view, the application filed by the appellant herein for passing a final decree for the sale of the property cannot be said to be barred by limitation.

10. Under these circumstances, the appeal is allowed and the judgment and decree of the Courts below are set aside and the appellant herein will be entitled to a final decree for the sale of the property as prayed for in the I.A. and the learned District Munsif is directed to take the I.A. on his file and pass a final decree for the sale of the property in terms of the provisions contained in Order 34 of the Code of Civil Procedure as well as the Forms contained in Appendix D of the First Schedule to the Code. There will be no order as to costs.

No leave.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

V.M. Rao and others .. *Appellants**

v.

Rajeswari Ramakrishnan and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 39, rules 1 and 2—Company—Family arrangement between shareholders—Not incorporated in the articles—Whether binding on company—Whether injunction could be granted.

The plaintiffs who were shareholders of the V.K. Co., filed a suit to enforce a family arrangement as binding on the other shareholders. They also sought for certain interim injunctions pending suit, and these applications were rejected. On appeal,

Held: the solemnity attached to the articles (of a company) and the binding nature thereof cannot be lightly whittled down by another contract which is in the nature of a family settlement which may be the equation of a domestic adjustment of differences or rights. Independent and separate rights in each of the shareholders are not built in the infra-structure of a corporate company. [*Para.* 5.]

The material before the Court, in the instant case was not sufficient to indicate that there was an enforceable family arrangement. The plaintiffs were not entitled to the *ad interim* injunctions as prayed for. [*Para.* 8.]

Cases referred to :—

Bacha F. Guzdar v. *Commissioner of Income-tax, Bombay*, 1955 S.C.J. 68; (1955) 1 S.C.R. 876: (1955) 1 M.L.J. (S.C.) 27: A.I.R. 1955 S.C. 74; In re *Westbourne Galleries*, (1973) A.C. 360; *Ram Autar Jalan* v. *Coal Products (P.) Ltd*, (1970) 40 Com. Cas. 715; *Nagappa Chettiar v. Madras Race Club*, (1949) 1 M.L.J. 662: I.L.R. (1949) Mad. 808: 62 L.W. 341; In re *A and B. C. Chowing Gum (Ch.D.)*, (1975) 1 W.L.R. 579.

*O.S.A. Nos. 97 and 98 of 1975.

24th December, 1975.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Mohan dated 22nd December, 1975 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Application Nos. 3246 and 3247 of 1975 in C.S. No. 322 of 1975.

K. Parasaran for *K.V. Prakash* and *K. Gopal*, for Appellants.

T.R. Ramachandran and *S. Swaminathan*, for Respondents.

The Order of the Court was made by

Ramaprasada Rao, J.—These appeals arise out of the order of Mohan, J., in which he refused certain reliefs prayed *ad interim* by the appellants as petitioners in an original suit filed by them on the original side of this Court. The plaint was by three shareholders of V. Ramakrishna Sons Limited against the other shareholders for certain reliefs. The learned Judge in his order has set out *in extenso* the reliefs asked for. In the original action the plaintiffs-appellants claim that the 6th defendant was the managing agent of a public company known as K.C.P. Limited and the said parent firm was floated by the common ancestor of the family, the late V. Ramakrishna. When he was alive V. Ramakrishna on his own initiative floated many companies such as the parent company and the R.S. Industrial Corporation Private Limited and the 6th defendant company as well. According to the plaintiffs when Ramakrishna was alive in order to set at rest present or possible bickering in the family, he made certain suggestions which were incorporated by the plaintiffs in the pleadings and reproduced by the learned Judge in his order whereunder certain mandates were set by him in the name of amity and harmony in the family in the case of the management and the affairs of the companies above named. We are here however concerned with the 6th defendant company. One of the terms of the family arrangement said to have been made by Ramakrishna when he was alive in the presence of and with the consent of the parties to the present original action runs as follows. "Participation in the management and affairs of V. Ramakrishna Sons Limited, the then Managing Agents of the K.C.P. Limited will be the exclusive entitlement of the two sons, V.M. Rao (first plaintiff), V.L. Dutt (fifth defendant) and/or their respective branches along with their mother V.R. Durgamba during her lifetime." Similar mandates are said to have been the subject-matter of the above family arrangement made by the late Ramakrishna. The plaintiff's specific case is that that family arrangement which is, no doubt, not incorporated in any instrument in writing was acted upon and agreed to by all the parties to the present action and the defendants 1 to 5 have acted quite contrary to the letter and spirit of the said family arrangement in the matter of the administration of the affairs of the 6th defendant company and it became necessary for them therefore to come to Court and seek for the necessary declarations which we are not incorporating in this order which in the main relate to the enforceability of and the binding nature of the family settlement said to have been made by Ramakrishna. Contemporaneous with the initiation of civil action as above, two interlocutory applications are filed, Application No. 3246 of 1975 and Application No. 3247 of 1975. In Application No. 3246 of 1975 which is supported by an independent affidavit sworn to by the first plaintiff, the allegations are in *pari materia* with the main allegations in the pleading. The plaintiffs sought for a temporary injunction against the respondents 1 to 6 restraining the implementation of a resolution of the 6th defendant company through its Board of Directors held on 3rd December, 1975 whereby the 5th defendant was authorised to act as the representative of the company with the right to vote at the annual general meeting of the K.C.P. Limited to be held at Madras on the 29th December, 1975. Incidentally, they sought also an injunction as against the second respondent or one Jayaraman, the manager of the 6th defendant company in case they were to act as alternates of the 5th defendant in the matter of the exercise of the voting power of the 6th defendant company at the annual general meeting of K.C.P. Limited. Application No.3247 of 1975 was another application in which the plaintiffs sought for a mandatory injunction permitting the

plaintiffs as applicants in the said application and respondents 1 to 5 to exercise the voting rights of the 6th defendant company at the annual meeting of K.C.P. Limited to the extent of their respective shareholding in the said company. Both these applications were heard together. The learned Judge was not *prima facie* satisfied that there was a binding family arrangement which could be taken judicial notice of at the interlocutory stage which would compel him to base his conclusion on that assumption. Having so expressed himself on the material allegations in the plaint the learned Judge would not grant the injunctions as prayed for. It is as against this, the present appeals have been filed.

2. Mr. Parasaran, learned counsel for the appellants touched upon the pleadings and the affidavits in support of the applications in which the injunctions are sought for. In the plaint a reference is made to the fact that a family arrangement was thought of by the late V. Ramakrishna and that he devised such an arrangement set out by the plaintiffs in paragraph 6 of the plaint. We have already excerpted the relevant clause. The defendants-respondents who have had the opportunity to plead only in their counter-affidavit refuted the existence of such family arrangement, in particular respondents 2 to in paragraph 4 of their counter-affidavit would deny that there was any family arrangement as elaborated in paragraph 6 of the plaint. They also deny that they agreed to the same at or about the time when it was conceived by the late V. Ramakrishna. They would only harp on the intention of the propositus who at all times inclined that the two brothers should jointly take over the management of the K.C.P. Limited and that his daughter should take over the management of Jaipur Sugars Limited. Repeatedly however they would characterise the family arrangement as an alleged one and would categorically deny it as well. It is in these circumstances, that the request of the appellants-petitioners should be adjudged.

3. For this purpose, however, certain relevant dates chronologically and the events that happened on such dates have to be set out. On 8th March, 1975 a notice to the shareholders was issued at or about the time when the plaintiff was about to retire by rotation. On 21st March, 1975, the first plaintiff apparently apprehending that the 5th respondent was about to induct the first and the second defendants into the Board of the 6th defendant referred once again to the settlement said to have been effected by the late Ramakrishna in 1962 and practically set out *in extenso* his grievances. If such an induction was permitted he would say, in his own words, "I would be deprived of any voice both in the affairs of the company and in the companies in which this company hold substantial shares." The 6th defendant however by its notice dated 27th March, 1975 called for an annual general meeting of the company on 22nd April, 1975 in which it included in the agenda items of special business such as the appointment of first and the second defendants as additional directors to the Board of the 6th defendant company. The said meeting as notified was held on 22nd April, 1975 in which the first, second and the third plaintiffs were represented by proxy. Amongst other items of agenda carried out on that date, the relevant items which were put forth and carried were the induction of the first and the second defendants to the Board. Thereafter, three board meetings took place in May, July and October, 1975. From the record it does not appear that till September, 1975 at any rate the plaintiffs took up any cudgels against the induction of the first and the second defendants as directors of the company. But on 2nd September, 1975 the first plaintiff made a formal representation to the company that the minutes of the meeting held on 22nd April, 1975 required a correction. While pointing out, according to him, the mistakes which crept into the record of the company he would in a cursory fashion refer to the fact that his proxy who attended the meeting on 22nd April, 1975 was not allowed to participate in the discussions. But as we said, the two directors were inducted in the annual general meeting on 22nd April, 1975 by a majority vote and in which the plaintiffs exercised their vote through their attorney. It is therefore fairly clear that on 2nd September, 1975 when the first plaintiff expressly referred

to the resolution at the annual meeting of the company on 22nd April, 1975 he did not categorically raise any objection against the election of the two directors. He did not even incidentally by necessary implication refer to the family arrangement. He only wanted that certain mistakes in the minutes are to be corrected as suggested by him. Thereafter, he gave another notice on 29th November, 1975 referring to the family arrangement and complaining that the induction of the first and the second defendants to the company as directors was opposed to and *contra* to the family arrangement. On 3rd December, 1975 the Board once again meets as by then it became necessary for them to pass a requisite resolution under section 187 of the Companies Act, whereby they were compelled to send one of their representatives to the 34th annual general meeting of the K.C.P. Limited. For this purpose, a meeting was called for on the 3rd December, 1975. Under items 3 of the agenda therein the 5th defendant failing him R. Prabhu the second defendant or failing him Sri A.V. Jayaraman, the manager of the 6th defendant company was authorised to represent the company at an annual general meeting of the K.C.P. to be held on 29th December, 1975 In that meeting a reference was also made to an earlier complaint made by the first plaintiff in his notice dated 29th November, 1975, and the Board resolved that there were no proper grounds for adjourning the meeting which was sought apparently by him. Regarding the vituperative matter in the said letter, the Board thought that the averments pertained to family matters between the concerned directors and it was a matter for the individuals to take it up themselves. Thereafter the first plaintiff repeated one again his grievance in his letter dated 12th December, 1975. The events chronologically set out as above do not give us the impression that the respondents in these applications at any time prior to the institution of the main action gave the plaintiffs the impression that they were agreeing to the alleged family settlement set out by the first plaintiff; nor did they agree with it by their conduct. *Prima facie*, therefore we are of the view that the learned Judge was right in having expressed on merits thus: "On a reading of the entire plaint I am unable to make out as to how it will be open to the applicants at this stage without any further proof to contend that there was a family arrangement relating to either the holding on the shares or the division of voting rights." Mr. Parasaran himself at one state would only depend upon the self-serving pleadings which are before us to project the case of an enforceable family arrangement. But the cause is yet to be tried. It is for the plaintiffs to establish in the course of the litigation that there was such a binding family settlement which is enforceable in a manner known to law. But these preliminary observations of ours are to find out whether the equitable remedy of injunction should be granted to the plaintiffs at this stage, and no doubt do not bind either of the parties to the litigation at the trial stage. But as the course of litigation is not yet over and as the plaintiffs have to establish in the teeth of opposition that there was such a family settlement thought of, conceived, implemented and acted upon by the members of the family, at this stage they are not able to accept the contention as such to find whether he equitable relief of an injunction could be granted or not.

4. Even assuming for argument's sake that the plaintiffs' case is true, it is difficult for us to accept the contention of Mr. Parasaran that a civil Court can in a summary enquiry like the one before us restrain the normal flow of the rights which are to follow the resolutions passed by an incorporated company while dealing with its indoor management. It is well established that there is a dischotomy as between the shareholders and the company and as the Supreme Court said in *Bacha F. Guzdar* v. *Commissioner of Income-tax, Bombay*[1].

> "There is nothing in the Indian Law to warrant the assumption that a shareholder who buys shares buys an interest in the property of the company which is a juristic person entirely distinct from the shareholders."

5. Family arrangements are arrangements made as between the members of

1. 1955 S.C.J. 68 : (1955) 1 S.C.R. 876: (1955) 1 M.L.J. (S.C.) 27 : A.I.R. 1955 S.C. 74.

the family in order to avoid genuine disputes in general and to promote corporate amity and goodwill. No doubt disputes *in presenti* and in future may also be the subject matter of such settlements. The foundation of a family settlement however is to create harmony amongst its members. But the question is whether in a family arrangement, *inter se* provision could be made touching upon the voting rights of shareholders in a corporate company, may be a private company. In a corporate company, it is an accepted canon that the memorandum of association is its Magna Carta and the articles of association is a business document, though subservient to the memorandum. In some private companies, the regulations in Table A are adopted so as to avoid repetition. If the table A regulations are thus adopted by incorporation as in the instant case, then such articles of association would be a binding contract as between the shareholders and the company. In a private company the bond of domestic relationship is the bedrock of incorporation. The solemnity attached to the articles and the binding nature thereof cannot be lightly whittled down by another contract which is in the nature of a family settlement which may be the equation of a domestic adjustment of differences or rights. Independent and separate rights in each of the shareholders is not built in the infra-structure of a corporate company. This is so because a special provision is made in the Companies Act itself which speaks of the methodology by which the articles of association could be amended, altered or varied. In fact, to amend or vary an article of a company, a special resolution in the prescribed manner is required. In the instant case, apart from the fact that there is no instrument evidencing the family arrangement, which of course is not necessary, the existence of such an agreement is seriously in dispute. What is vaguely suggested is that for several months such an arrangement was freely talked of and the Courts should therefore presume that such an arrangement has been arrived at by the parties having regard to such supervening conduct. We have already referred to the events which do not either collectively taken or independently considered give us the reasonable impression that there was any such binding family arrangement. It is however for the plaintiffs to bring in more hypothesis to establish. Mr. Parasaran however says that the just and equitable rule should be invoked and the Courts are not to be wooder in the matter of the invocation of such principles in cases like this. No doubt, the corporate veil can be pierced through in cases where the Courts' conscience is provoked and there is sufficient and ample material to crack the shell of incorporation. But this doctrine cannot be extended so as to substitute the articles of association which is a binding contract as between the members and the company by another contract which in the eye of law and according to the provisions of the Companies Act cannot be adopted, recognised and captioned as articles of association. It is conceded that the articles have not been so far amended so as to prevent the induction of more directions or to divide the voting rights in a manner as spoken to by the plaintiffs. If the terms of the family arrangement have been incorporated in the articles there would have been no difficulty But so long as regulation 74 of table A is the guideline and the norm which ought to be followed by the present company, then to make an inroad into such an agreed prescription something which is effective in the eye of law is necessary and not a vague assertion about the existence of a family arrangement which as we repeated before is not accepted and is disputed. It is also an accepted principle of law that if a special method is prescribed to do a particular act, there cannot be any circumvention to that method, even though the alternative procedure sought for might be congenial, genuine, just or equitable. We have referred to the apprehensions of the plaintiffs in his correspondence wherein he complained of the possible oppression by the majority. If the plaintiffs are so apprehensive and if they are confident that the affairs of the company, in the hands of such a majority would prejudice them the Companies Act again in Chapter VI has provided under sections 397 and 398 adequate relief to such aggrieved persons to obtain the necessary reliefs. But, in our view, a civil Court functioning under the normal common law cannot usurp the powers of a Company Court whose jurisdiction springs from an enactment of

Parliament and adjudge common law rights on *a priori* considerations.

6 The two directors *i.e.*, the first and the second defendants were inducted on 22nd April, 1975 Three further meetings were held after they became qualified to sit in the Board and no objections were raised against their functioning by the plaintiffs as co-directors. As rightly pointed out by Mr. T.R. Ramachandran, if there is any flaw in the appointment of the first and second defendants as directors, section 290 of the Companies Act would make their acts valid, notwithstanding any invalidity attached to their appointment. Again the resolutions passed on 3rd December, 1975 is a resolution passed in the usual course of corporate business. As the annual meeting of K.C.P. Limited is coming, the 6th defendant as a shareholder in that company is to be represented. The manner of representation, the method by which persons could be sent to represent an incorporated company in an annual meeting of another incorporated company are again prescribed. under section 187 of the Companies Act. Any meeting of the Board is governed by the principle of the rule of majority. This is so because regulation 74 in table A has been incorporated in the articles of association of the 6th defendant company. The resolution passed by the company on 3rd December, 1975 which is seriously challenged by the plaintiffs-appellants is one passed by the company in its usual course and in accordance with the provisions of the Companies Act. It is in these circumstances the contention of Mr. Parasaran has to be weighed that notwithstanding the technicalities as above, the reasonable apprehension entertained by the plaintiffs that they would be oppressed by the majority should take the field and justice and equity should be done by preventing the 5th defendant or the other nominees as per the resolution dated 3rd December, 1975 to participate in annual meeting of K.C.P. Limited. In fact, the first plaintiff while complaining of such oppression would suggest a resolution by himself which was framed by him in his letter dated 21st March, 1975. If that resolution is passed by the company, he would say, that he would have no objection to the first and second defendants being elected as directors. In the light of this concession made by the first plaintiff, we are afraid that the just and equitable rule pleaded by Mr. Parasaran, would be totally inapplicable. The first plaintiff seeks for equity for the furtherance of his own cause. No Court would invoke equity in such circumstances.

7. Learned counsel for the appellants referred to In re *Westbourne Galleries*(H.L.(E))[1], in which the just and equitable rule was invoked in a case where a company was sought to be wound up. At page 375 the learned law Lords were told where a limited company, however, small, essentially differs from a partnership ; and that in the case of a company the rights of its members are governed by the articles of association which have contractual force and that the Court has no power or at least ought not to dispense parties from observing their contracts ". These submissions made to the learned law Lords were accepted by the House of Lords. Further, that was a case where the history of the company was traced to a partnership and the Court found as a fact that the company was working more on the lines of quasi-partnership and having regard to the facts of that case it had to be wound up because of certain circumstances, on the principle of just and equitable rule. In *Ram Autar Jalan* v. *Coal Products (P.) Ltd.*[2], the Supreme Court was considering a case where the aggrieved person was not shown as a shareholder and was not appointed as a director of the Company as claimed by him. In those circumstances, the Supreme Court said a civil action could be founded by the company so as to disclaim the claims of an impostor. *Nagappa Chettiar* v. *Madras Race Club*[3], was a case prior to the passing of 1956 Companies Act which was later amended. That was a situation where the Court granted relief to the aggrieved person against the oppression of the majority by allowing him to agitate such problems in a civil Court. But on the date when the present action had been filed, there was an alternative remedy provided under the Companies Act

1. (1973) A.C. 360.
2. (1970) 40 C.C. 715.
3. I.L.R. (1949) Mad. 808 : 62 L.W. 341 : (1949) 1 M.L.J. 662.

itself which would enable the plaintiffs to secure such reliefs in case of mismanagement or oppression when the affairs of the company were not properly or regularly carried out. The case in In re *A and B C Chowing Gum* (*Ch.D.*)[1], was one in which there was an open violation of the articles of association. It was in those circumstances the just and equitable rule was invoked, and a civil action which was contemporaneously filed along with the proceedings under the Companies Act, was entertained and adjudicated upon.

8. In the present case however it is for consideration whether the injunction asked for by the appellants could be granted either under Order 39, rule 2 or Order 39, rule 1, Civil Procedure Code, rule 2 of Order 39, refers to the grant of an injunction to restrain repetition or continuance of breach of a contract or other injury. This is not a case of breach of contract. But it is argued that the plaintiffs are injured by the resolution dated 3rd December, 1975. An injury could be projected only if there is a base for complaint. The resolution as we expressed already could be passed by the 6th defendant and its Board and it is within their competence. In fact, no relief is asked for by the plaintiffs as against the 6th defendant or even the 5th defendant. It is by virtue of the resolution of the Board of Directors of the 6th defendant that the 5th defendant or the other nominees mentioned in the resolution are going to represent the 6th defendant at the annual meeting of the K.C.P. Limited. If no relief is asked as against the 6th defendant, then it passes our comprehension as to how under Rule 2 of Order 39 the plaintiffs may complain of any injury to him. Under Order 39, rule 2, Indian Penal Code also in our view the plaintiffs cannot get an *ad interim* injunction. No property of the 6th defendant is in dispute or is in danger of being wasted, damaged or alienated nor is it pretended that the company or the other defendants intend to defraud the creditors and dispose of unauthorisedly the property of the company. As long as the resolution made by the company through its Board of Directors on 3rd December, 1975 is not questioned in the sense not questionable, the complaint about a future breach rests purely on a self-projected hypothesis of a family arrangement. The material before us is not sufficient to accept the contention of Mr. Parasaran that there is an enforceable family arrangement. There is time enough for the plaintiffs to establish the same. But as matters stand we agree with the learned Judge that the plaintiffs are not entitled to the *ad interim* injunctions as prayed for. The appeals are therefore dismissed. There will be no order as to costs.

1. (1975) 1 W.L.R. 579.

S.J. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N.S. Ramaswami, J.*

Mythili Raman .. *Appellant**

v.

Captain K.T. Raman .. *Respondent.*

Hindu Marriage Act (XXV of 1955), sections 10 (1) (b) and 24—Husband's petition for judicial separation—Cruelty alleged—Petition by wife for interim alimony—Court disposing of the main petition first—Procedure adopted by Court, if proper.

Though in section 24 of the Hindu Marriage Act there are no words specifically saying that an application under that section has to be disposed of prior to the main petition being taken up for trial, a perusal of that section would go to show that an application under that section is intended to be disposed of in the first instance. It is clear from the section that an application under section 24 is to be disposed of during the pendency of the proceedings, *viz.*, the main petition. It is not right to say that because there are no words specifically saying that an application under section 24 has to be heard in the first instance before even the main petition is taken up for trial, the Court is at liberty to tack on the application with the trial of the main petition itself. The object of section 24 is to provide necessary funds to the needy spouse to prosecute the proceedings as well as to maintain himself

*A.A.O. Nos. 336 of 1968 and 91 of 1969. *2nd January,* 1976.

or herself during the pendency of the proceedings. Therefore there is no room for the Court not passing any orders on the application and relegating the same to be taken up to the main petition itself.

[*Para.* 4.]

Appeals against the orders of the City Civil Court (III Asst. Judge) Madras dated 14th November, 1968 and made in O.P. No. 108 of 1967 and I.A. No. 16287 of 1967 in O.P. No. 108 of 1967 respectively.

A.C. Muthanna for *M. Subramaniam* and *Ranjit Jacob*, for Appellant.

C.S. Padmanabhan for *King and Partridge*, for Respondent.

The Court made the following

ORDER.—These two Civil Miscellaneous appeals by a Hindu wife arise under peculiar circumstances. The husband filed a petition under section 10 (1) (*b*) of the Hindu Marriage Act (herein after referred to as the Act), for judicial separation on the ground that the wife had been guilty of cruelty towards him. The wife contested the petition refuting the allegations made by the husband against her. She also filed an application under section 24 of the Act for interim alimony and expenses of proceedings. The husband filed a counter-affidavit opposing the aforesaid application under section 24. Peculiarly enough, the Court below did not hear this application and passed no order thereon. It had been adjourning the application along with the main petition for judicial separation from time to time. In fact, on behalf of the wife, an application for advancing the hearing of the abovesaid application *viz.*, the application under section 24, was also filed as the Court below had adjourned the said application along with the main petition to a particular date. It may be noted that the lower Court fixed the date finally for the trial of the main petition for judicial separation. Naturally, the wife wanted her application under section 24 to be taken up in the first instance and disposed of so that she can get ready for the trial of the main petition. Unfortunately the Court below not realising that an application under section 24 has to be decided in the first instance before ever the main petition is taken up for trial had adjourned even the application to advance the hearing of the application under section 24 to the date on which the main petition stood posted. No orders were passed on the application under section 24.

2. The main petition stood posted for trial, in September, 1968. The application under section 24 for interim alimony and expenses had been filed even in 1967. Still no order has been passed on the said application. From September, 1968 the main petition came to be adjourned to November, 1968 as the final date for trial of the said petition. It is after September, 1968 the application for advancing the hearing of the application under section 24 came to be filed. However, as I said no order was passed on any of these applications.

3. On the date on which the main petition and the application under section 24 were taken up (November, 1968) it had been represented on behalf of the wife that her counsel was ready to argue the application cand not ready to get on with the trial of the main petition. The learned Judge of the City Civil Court was not prepared to concede the above request. He directed the counsel for the wife to report no instructions. However, the counsel rightly said that he was not reporting no instructions, but still he had been insisting that the application under section 24 should be taken up for hearing and the main petition adjourned to a subsequent date. As the Court below wanted the main petition to be heard in the first instance, the counsel withdrew. The wife was also absent from Court. Then, the Court set the wife, who is the respondent in the main petition, *ex parte* and after examining the husband as P.W. 1 gave a decree for judicial separation.

4. Needless to say that the course adopted by the court below is against the provisions of the Act. Though in section 24 there are no words specifically saying that an application under that section has to be disposed of prior to the main petition being taken up for trial, a perusal of that section would go to show that an application under that section is intended to be disposed of in the first instance. The marginal note for that section is :

> " Maintenance *pendente lite* and expenses of proceedings."

The section opens with the words :

> " Where in any proceeding under this Act it appears. "

Therefore, it is clear that an application under section 24 is to be disposed of during the pendency of the proceedings, *viz*, the main petition. It is not right to say that because there are no words specifically saying that an application under section 24 has to be heard in the first instance, before ever the main petition is taken up for trial, the Court is at liberty to tack on the application with the trial of the main petition itself. The object of section 24 is to provide necessary funds to the needy spouse to prosecute the proceedings as well as to maintain himself or herself during the pendency of the proceedings. Therrfore, there is no room for the Court not passing any order on the application and relegating the same to be taken up with the main petition itself.

5. One appeal before me is against the *ex parte* decree for judicial separation passed by the Court below. The other appeal is against the consequential order passed by the lower Court on the application under section 24. As the main petition itself came to be decreed *ex parte* the Court below dismissed the application under section 24.

6. I am of the view that the main petition has to be sent back to the trial Court for fresh disposal. As far as the application under section 24 is concerned, I think it is not necessary to send back the same to the Court below. During the pendency of these appeals Krishnaswamy Reddy, J., has passed orders fixing interim maintenance during the pendency of the appeals and has also ordered the husband to pay a sum of Rs. 500 as expenses for prosecuting the appeals. The interim maintenance ordered is for the wife and the son at Rs. 600 per month. Considering the fact that the husband is an Air India Pilot and other circumstances in the case, I think the interim maintenance fixed by the learned Judge, can continue during the pendency of the petition in the Court below as the same is being sent there for a fresh disposal. I direct the husband who is the respondent in these appeals to pay a sum of Rs. 300 as expenses of proceedings in the trial Court, which sum would be in addition to the sum of Rs. 500 which had been directed by Krishnaswamy Reddy, J., as the amount payable to meet the expenses of the present appeals. I further direct that the above said sum of Rs. 300 is to be paid within one month from this date.

7. Accordingly, C.M.A. No. 91 of 1969 is allowed as indicated above.

8. C.M.A. No. 336 of 1968 which is against the *ex parte* decree for judicial separation is also allowed. The decree of the Court below is set aside and the matter remitted back for fresh disposal on merits. There will be no order as to costs in these appeals.

9. I may add that the Court below had not tried to bring about any reconciliation between the parties as contemplated under section 23 (2) of the Act. That is again a point for setting aside the decree of the Court below granting judicial separation. But, at the same time, I should further say that hereafter there is no need for the lower Court to attempt at any reconciliation between the spouses. I say so because the counsel on either side represent that when the appeals were before Krishnaswamy Reddy, J., the learned Judge made several attempts to bring about reconciliation between the spouses and it was found to be wholly impossible. I am recording this fact and as a consequence I direct the lower Court not to waste further time in trying to bring about reconciliation between the parties as contemplated under section 23 (2) of the Act.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Thirumalaiswami Goundar .. *Appellant**

v.

Parvathi Ammal (died) and others .. *Respondents.*

Hindu Law—Joint family properties—Death of only coparcener—Female members left—Whether female member can act as manager—Debts of coparcener—Alienation of property by his wife acting as manager—Female member cannot become manager nor can alienate properties—Impact of adjustment of equities on the alienation at final division of properties.

T died leaving behind him his wife, a major and a minor daughter and his mother. He also left some properties and some debts. *T's* wife acting as manager of the joint family alienated 4 acres of land to discharge the debts incurred by T as well as to discharge some debts incurred by her *T's* mother and his major daughter questioned the alienation.

Held: In a case where the propositus leaves only female members since such female members share the properties only as tenants in common, each cannot project a right in herself and deal with the others' share, even on the foot of necessity. *Prima facie*, the wife did not have the requisite authority to sell the concerned land. But as the mother and the major daughter were together responsible for discharging three-fourths of the admitted debts contracted by *T* when he was alive, it followed that such debts were binding on the plaintiffs and the second defendant (minor daughter) and this had to be borne in mind at the time when a final division was effected of the family properties as between the sharers thereto.[*Paras.* 8 *and* 10]

Cases referred to:—

C.M.N. Radha Ammal, Kancheepuram v. *The Commissioner of Income-tax, Madras*, (1950) M.W.N. 317 : (1950) 1 M.L.J. 399: 63 L.W. 311: A.I.R. 1950 Mad. 538; *Commissioner of Income-tax, M.P., Nagpur and Bhandara, Nagpur*, v. *Seth Govindram Sugar Mills*, (1965) 2 I.T.J. 170 : (1965) 2 S.C.J. 289 : 57 I.T.R. 510: (1965) 3 S.C.R. 488 : A.I.R. 1966 S.C. 24.

Appeal against the decree of the First Additional Subordinate Judge, Coimbatore in Original Suit No. 299 of 1967.

T.R. Ramachandran, K. Chandramouli and *T.R. Rajagopalan*, for Appellant.

N. Varadarajan, S. NainarSundaram and *V. Natarajan*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The fifth defendant in O.S. No. 299 of 1967 on the file of the Subordinate Judge of Coimbatore is the appellant. One Thangamuthu Gounder died possessed of the suit properties, he having secured the same under a partition in his family in or about July, 1932 as seen from Exhibit A-3 dated 22nd July, 1932. He left behind him his mother (the first plaintiff), his eldest daughter (the second plaintiff), his widow (the first defendant) and his minor daughter (the second defendant) as his surviving heirs. He died in 1966 and, therefore, succession to his estate has to be determined with reference to the provisions of the Hindu Succession Act. It is not in dispute, therefore, that the two plaintiffs on the one hand and defendants 1 and 2 on the other would each be entitled to a moiety in the properties of Thangamuthu Gounder. In those circumstances the plaintiffs instituted the present action for partition of the suit properties which admittedly belonged to Thangamuthu Gounder, into two equal shares and for allotment of one such share to them and for the usual rendition of accounts by the first defendant after the death of Thangamuthu Gounder and for costs.

2. While Thangamuthu Gounder was alive, he borrowed monies under a deed of mortgage Exhibit B-5 dated 7th August, 1952 executed in favour of the third defendant. Again, he borrowed monies on a promissory note from the fourth defendant, which ended in a decree as against him,

*A. No. 763 of 1969. *2nd February,* 1976.

when he was alive in O.S. No. 38 of 1963 on the file of the District Munsif's Court, Udumalpet. The widow of Thangamuthu Gounder *viz.*, the first defendant after having been apprised of an attachment of the properties in execution of the money decree as above obtained by the fourth defendant and in order to discharge the said decree debt as also the mortgage debt which was subsisting on the date of her husband's death, she sold 4 acres of the suit properties for a sum of Rs. 8,000. This sale was under Exhibit B-4 dated 26th May, 1967. The consideration of this sale deed as per the recitals therein consists of the following : A sum of about Rs. 3,270 paid by the fifth defendant, who purchased the properties under Exhibit B-4, to the third defendant, who was the mortgagee as per Exhibit B-5, as also a sum of about Rs. 1,312.21 which was paid in discharge of the decree debt obtained by the fourth defendant against Thangamuthu Gounder and further sums of Rs. 2,120 and Rs. 1,100 to discharge debts contracted by the first defendant herself after her husband's death under promissory notes Exhibits B-1 and B-2 respectively dated 15th May, 1966 and 20th June, 1966 in all, and after discharging the aforesaid debts as recited in the instrument of sale Exhibit B-4, the first defendant received a sum of Rs. 187 as cash consideration for the sale of 4 acres of the family properties under Exhibit B-4. When the plaintiffs came to Court the above alienation was already effected. They questioned the above alienation as not binding on them. Their case is that the sale itself was a fraudulent one and that they were prepared to pay the admitted debts left by Thangamuthu Gounder and could not be made responsible for any other borrowings made by the first defendant.

3. In the written statement filed by defendants 1 and 2 their case is that the first defendant sold 4 acres of the family properties not only to discharge her husband's debt, but also to incur the necessary expenses in connection with the marriage of the second plaintiff and, therefore, the debt contracted by her in such a situation is binding on the other family members of the family. She would also urge that she had taken the precaution of selling only such portion of the family properties so as to discharge the antecedent debt and to borrow monies for necessity and, therefore, the plaintiffs are bound by the said alienation and that the remaining land only could be susceptible to partition.

4. The fifth defendant supports the first defendant's case and says that as the wife of Thangamuthu Gounder and as the manager of the family, she was in possession of the family properties and the sale effected by her so as to pay off earlier debts and to borrow for necessity is binding on the other members as well. He would claim to be a *bona fide* purchaser for value and requested the Court to sustain the sale in his favour. We may at once state that it is not in dispute that the fifth defendant as alienee has paid off the mortgage debt under Exhibit B-5 and also the decree debt in O.S. No. 38 of 1963 on the file of the District Munsif's Court, Udumalpet which, as already stated, were debts contracted by Thangamuthu Gounder when he was alive. On the above pleadings the following issues were framed:

(1) Whether the sale deed and lease deed dated 26th May, 1967 are true and binding on the plaintiffs?

(2) Whether the 5th defendant is a *bona fide* purchaser for value?

(3) Whether the 5th defendant has acquired any right or equity in respect of the suit properties?

(4) Whether the 5th defendant is entitled to a charge for the sums paid by him on account of the earlier mortgages?

(5) Whether item No. 3 house is the property of the late Thangamuthu and is available for partition?

(6) Whether item No. 2 house cannot be partitioned?

5. The learned Judge found that the first defendant had not the requisite authority under the provisions of the Hindu Succession Act of 1956 to effect a sale of a portion of the family properties and that that could not be done under the guise of necessity as well, since she could not claim the status of a manager of a Hindu undivided family, who could only effect such

alienation in case of necessity and for the benefit of the family. In those circumstances, the learned Judge would not agree with defendants 1, 2 and 5 that the alienation under Exhibit B-4 was a binding one. He gave a preliminary decree for partition of the suit properties excepting item No. 3 in the plaint schedule and directed the first defendant to render an account of the income from the family properties in her possession after the death of Thangamuthu Gounder. The fifth defendant, who is mainly affected, has filed this appeal as against the judgment and decree of the Court below.

6. There is no dispute before us about the disallowance of item No. 3 of the scheduled properties. Mr. T.R. Ramachandran, the learned counsel for the appellant lays great stress on the fact that the lower Court did not bear in mind the fact that a major portion of the consideration in the sale effected by the first defendant under Exhibit B-4 went for the discharge of debts contracted by Thangamuthu Gounder himself and did not even make a provision for the payment of such debts from the estate. As we said already, the dischaarge of such debts from and out of such consideration which flows from Exhibit B-4 is not disputed before us.

7. The second contention of Mr. T.R. Ramachandran is based on a well-known rule of adjustment of equities as between the members of a joint family in case where the alienee comes into the picture by purchase of an undivided share of the properties belonging to the family from one or the other members of such a family. He would, therefore, contend that as the lower Court did not find that the alienation was fraudulent as contended by the plaintiffs, he ought to have suggested or made certain observations regarding the adjustment of equities as between the alienee of the family properties and the rest of the members of the family and he also seeks for a binding finding about the major portion of the consideration that passed under Exhibit B-4 being for discharge of the debts contracted by the ancestor of the family himself. The learned counsel for the respondents is not in a position to contend to the contrary for the simple reason that the propositions for which Mr. T.R. Ramachandran was arguing are so very well laid and well founded. But the respondents' counsel contends that at this stage this Court need not make any observation regarding the adjudgment of equities and that can be left over for the lower Court to equalise or equitably adjust the shares at or about the time when the final decree is passed.

8. All the four members, who could succeed to the properties of Thangamuthu Gounder, are female members. In such a situation the position is clear that such female members, who succeed to the ancestor, take, no doubt definite shares in the estate under the Hindu Succession Act; but the interest of each in it is as a tenant in common. This concept of tenancy in common has a peculiar significance. Though it entitles a sharer to claim an independent share in the joint family properties, yet she cannot act for other members of the family and assume the garb of joint family manager or an eldest member of the family so as to alienate or part with such proprties for the benefit of one or such other membrs. The principle that a male member could in such circumstances even though a younger member can act for others in times of emergency, necessity and benefit and alienate a portion of the property and plead, when it is contested, that such an alienation was for the benefit of the family or for necessity this defence is avilable to such a male member. But in a case where the ancestor leaves only female members and as such female members share the properties only as tenants in common, each cannot project a right in herself and deal with the other's share, even on the foot of necessity. This was the well accepted canon even before the passing of the Hindu Succession Act. This principle was so recognised in *C.M.N. Radha Ammal, Kancheepuram* v. *The Commissioner of Income-tax, Madras*[1]. This decision has been approved by the Supreme Court in *Commissioner of Income-tax, Madhya Pradesh, Nagpur and Bhandara, Nagpur* v. *Seth Govindram Sugar Mills*[2]. The Supreme Court

1. (1950) 1 M.L.J. 399 : (1950) M.W.N 317 : 63 L.W. 311 : A.I.R. 1950 Mad. 538.

2. (1965) 2 I.T.J. 170 : (1965) 2 S.C.J. 289: 57 I.T.R. 510 : (1965) 3 S.C.R. 488 : A.I.R. 1966 S.C. 24.

has held that under Hindu Law coparcenership is a necessary qualification for the managership of a joint Hindu family, that a widow is not a coparcener, she has no legal qualifications to become the manager of a joint Hindu family and that a widow of a coparcener cannot, therefore, be a karta of the joint Hindu family consisting of three widows and two minors. After the passing of the Hindu Succession Act the position has become more clear, since the family members, who are the sole surviving members of the joint family, take their respective interests in the joint family properties as tenants in common. Section 19 (*b*) of the Hindu Succession Act, 1956, says that if two or more heirs succeed together to the property of an intestate, they shall take the property as tenants in common and not as joint tenants. Section 19 (*a*) of the Act is not necessary for the purpose of our discussion. Therefore, the first defendant in the instant case did not acquire the status of a manager, which status alone would entitle her to deal with joint family properties and in particular deal with not only her share in it, but also the shares of her daughters. *Prima facie*, therefore, the first defendant did not have the requisite authority to sell the 4 acres of joint family properties under Exhibit B-4 to the fifth defendant.

9. But the additional circumstance in this case outweighs the general principles referred to above and compels us to adopt the equitable rule that the interest of an alienee in joint family properties should as far as possible, be safeguarded and the equities *inter se* as between him and the members of the family adjusted when a partition takes place in such a family. Bearing this essential principle which also concurrently applies and which in the instant case is necessarily invokable, the equities of the parties have to be adjusted.

10. We have already referred to the undisputed fact that out of the consideration of Rs. 8,000 - paid under Exhibit B-4, by the appellant, a sum of about Rs. 4,582.21 went to the discharge of the debts contracted by Thangamuthu Gounder himself when he was alive. The other portion of the consideration *viz.*, a sum of Rs.2,120 paid to discharge the promissory debt under Exhibit B-1 and a sum of Rs. 1,100 paid to discharge the debt under Exhibit B-2 dated 20th June, 1966 cannot bind the plaintiffs. It is in this difficult situation the equities have to be adjusted. According to the fifth defendant the entirety of 4 acres of lands purchased by him are not fertile lands. The plaintiffs, on the other hand, would say that a small portion of the family properties is rocky land. There has not been a sufficient investigation, presumably because it was not quite necessary at that stage as to the nature of the property and the quality of the property purchased by the fifth defendant. But as the plaintiffs and the second defendant are together responsible for discharging three-fourths of the admitted debts contracted by Thangamuthu Gounder when he was alive, it follows that such debts are binding on the plaintiffs and the second defendant, and this has to be borne in mind at the time when a final division is effected of the family properties as between the sharers thereto. We, therefore, find that the debts are binding, as found by the Court below, on the plaintiffs and the second defendant. But we add that this circumstance shall be taken into consideration by the Court below when a final decree is passed pursuant to the preliminary decree already passed. Mr. T. R. Ramachandran would say that even assuming as suggested by the other side that 10 acres out of 18 acres of the family lands are fertile lands, he would in equity be entitled to 2½ acres of such fertile lands and for this purpose this Court may make a binding recommendation to the Court below to the effect that at the time of the passing of the final decree, at least 2½ acres of fertile lands of the family properties, if nor more, be allotted to the share of the first defendant, so that her alienee *viz.*, the appellant may get the benefit out of it. This appears to be a reasonable request. As we said already, there are not enough materials on record to find positively as to how many acres of lands belonging to the joint family are fertile lands. Both the parties referred to some rocky lands as family lands. No one has spoken to the extent of such rocky lands. In those circumstances, we feel that in the interests of justice and having regard to the well-known principle of adjustment of equities as between the

members of a joint family and an alienee, we should make it clear that at the time of the final decree the first defendant will be allotted the lands already alienated by her as and towards share and in doing so the lower Court will remember that at least 2½ acres of fertile lands will be allotted to the share of the first defendant, which advantage will necessarily flow to the appellant, as well. In so far as the rest of the lands alienated by the first defendant in favour of the appellant is concerned, the Court below shall after further investigation and as far as possible see that the equities between the parties are so amicably adjusted, so that greater prejudice than necessary is not caused to the appellant.

11. With the above observations, the appeal is partly allowed. But there will be no order as to costs.

S.J. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

M. Govindarajulu .. *Petitioner**

v.

M. Jayaraman .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control Act (XVIII of 1960), *sections* 10 (3) (a) (1), 10 (3) (c), 10 (4), 19 *and* 29—*Landlord's petition under sections* 10 (3) (a) (1) *and* 10 (3) (c) *dismissed with a finding of requirement not being* bona fide—*Landlord obtaining exemption under section* 29—*Subsequent eviction petition—Finding in earlier proceedings not* res judicata.

A prior eviction proceeding by the landlord was dismissed in view of the tenant's claim to protection under section 10 (4) of the Tamil Nadu Buildings (Lease and Rent Control) Act, with a finding of landlord's requirement not being *bona fide.* Subsequently the landlord obtained exemption, as far as this section is concerned, from the Government under section 29 of the Act. After obtaining exemption the landlord filed the present eviction petition.

On these facts held : It was unnecessary for the Rent Controller's Court, which decided the prior proceedings, to go into the question of *bona fides,* inasmuch as section 10 (4) specifically states that no order for eviction shall be passed in such cases. In view of such a mandatory direction prohibiting the Court to pass any eviction order against that person who comes squarely under section 10 (4) (1), the finding on other issues regarding the *bona fides* must be construed as *ab initio* void. In cases wherein want of notice was raised and the same was decided as one of the issues along with other issues, there is no prohibition to go into such issues along with the question of want of notice. Inasmuch as the finding in the prior proceedings has to be construed as *ab initio* void in view of section 10 (4) (1) of the Act, Section 19 is not a bar for the subsequent eviction proceedings. [*Para.* 11.]

Cases referred to:—

Gangappa v. *Rachawwa,* (1971) 2 S.C.J. 555 : A.I.R. 1971 S.C. 442; *Union of India* v. *Nanak Singh* (1968) 2 S.C.R. 887: (1968) 2 S.C.J. 881 : A.I.R. 1968 S.C. 1370; *Veerasami Mudali* v. *Palaniyappan,* 46 M.L.J. 515 : A.I.R. 1924 Mad. 626 ; *Shankarlal* v. *Hiralal,* A.I.R. 1950 P.C. 80 ; *Mathura Prasad* v. *Dossi bai,* (1970) 2 S.C.J. 685: (1970) 3 S.C.R. 830; A.I.R. 1971 S.C. 2355: *Tarini Charan Bhattacharjee* v. *Kedar Nath Haldar,* (1929) I.L.R. 56 Cal. 723: A.I.R. 1928 Cal.777; *Rajagopal Transports* v. *Presiding Officer,* (1971) 1 M.L.J. 488 ; *Muthu Pillai* v. *Veda Viyasa Chettiar,* 12 L.W. 277: 60 I.C. 397 ; *Official Trustee* v. *S. N. Chatterjee,* (1969) 2 S.C.J. 123 : (1969) 3 S.C.R. 92 : A.I.R. 1969 S.C. 823.

Petition under section 25 of Act XVIII of 1960 as amended by Tamil Nadu Act XXIII of 1973 praying the High Court to revise the Order of the IV Judge, Court of Small Causes, Madras, dated 7th March, 1975 and made in H.R.A. No. 270 of 1974 (H.R.C. No. 2427 of 1972, VIII Judge Court of Small Causes, Madras.)

T. Viswanatha Rao, for Petitioner.

S. Pichai and *Basheer Ahmed,* for Respondent.

*C.R.P. No. 1390 of 1975. *23rd February,* 1976.

The Court delivered the following

JUDGMENT.—The tenant is the revision petitioner herein. The respondent herein, who is the landlord, filed an eviction petition under sections 10 (3) (*a*) (*i*) and 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960. The respondent here in averred in the eviction petition that he has no other residential house in the City of Madras, that he filed an eviction petition against all the tenants in the premises including the respondent, that the eviction petition against the tenant herein, was dismissed as the tenant claimed to be entitled to the protection under section 10 (4) (*i*) of the Act, that the landlord then moved the Government under section 29 of the Act and got exemption with regard to the benefit of section 10 (4) (*i*) of the Act and that since the tenant did not vacate, the landlord, after giving lawyer's notice, filed the eviction petition. The landlord has further averred that since he wanted the whole of the premises for his own occupation, he has kept the portions that had fallen vacant under lock and key as it is not suitable or sufficient.

2. The tenant, as the respondent in the eviction petition, contended that the order in H.R.C.No.395 of 1968 is a bar for the present eviction petition, that there is no *bona fides* in the landlord's petition for eviction, that the downstairs portion that has fallen vacant is sufficient for the landlord to occupy, that the inconvenience that will be caused to the tenant will be much more than to the landlord if eviction is ordered and that the notice of termination does not conform to the statutory requirements.

3. The Rent Controller, observing that the landlord is not living in his own house and residing in a rented house and that the landlord's requirement is *bona fide*, ordered eviction giving three months' time to the tenant to vacate.

4. Aggrieved by the order of the Rent Controller, the tenant preferred an appeal to the IV Judge, Court of Small Causes, Madras who is the appellate authority. The appellate authority took up for consideration as to whether the requirement of the landlord is *bona fide* and that whether the present application is barred under section 19 of the Act. The Court below also took up for consideration as to whether the notice to quit is valid. The lower appellate Court, after observing that the prior finding as regards the *bona fides* of the requirement by the landlord is quite unnecessary for the disposal of the application inasmuch as that application was dismissed under section 10 (4) of the Act, held that the present application is not hit by section 19 of the Act. The lower appellate Court also found that there is *bona fides* in the requirement of the landlord to occupy the building in question for his own use and that the petition under section 10 (3) (*a*) (*i*) is maintainable.

5. Aggrieved by the order of the Court below, the tenant has preferred the above civil revision petition. Mr. Viswanatha Rao, the learned counsel appearing for the revision petitioner urged all the points raised before the Courts below. As regards the *bona fides*, both the Courts below have concurrently found that the requirement of the landlord is *bona fide*. It is clear from the facts of the case that the respondent herein purchased the property for the purpose of occupying it by himself and that he was not able to occupy the same, inasmuch as the petitioner alone has not vacated the upstairs portion of the building even though other tenants were evicted from the suit premises. It is also clear from the facts of the case that unless all the portions are vacated, it is not possible for the landlord to occupy the house. Hence I am of the view that there is absolutely no impropriety, illegality or irregularity in the finding of the Courts below as regards the *bona fide* requirement of the landlord and also as regards the finding that the petition under section 10 (3) (*a*) (*i*) of the Act will lie in this case.

6. The next question which was vehemently urged by Mr. Viswanatha Rao is that the prior application for eviction, though dismissed under section 10 (4) of the Act, gave a finding as regards the *bona fide* nature of the requirement made by the respondent herein. That finding as per section 19 of the Act is a bar to agitate once again the question

of *bona fides* in this proceedings. I have been taken through the order passed in the prior application and also the relevant provisions of the Rent Control Act. Mr. Viswanatha Rao also cited in *Gangappa* v. *Rachawwa*[1], to substantiate his contention under section 19 of the Act. In that case the Supreme Court has held:

> "Where the plaint on the face of it does not show that any relief envisaged by section 80 of the Code is being claimed, it would be the duty of the Court to go into all the issues which may arise on the pleadings including the question as to whether notice under section 80 was necessary. If the Court decides the various issues raised on the pleadings, it is difficult to see why the adjudication of the rights of the parties, apart from the question as to the applicability of section 80 of the Code and absence of notice thereunder should not operate as *res judicata* in a subsequent suit where the identical question arises for determination between the same parties."

From this, Mr. Viswanatha Rao says that inasmuch as in the prior proceedings the Court has gone into the question of *bona fides* and decided against the landlord, the dismissal is both on the ground of section 10 (4) and also after considering the *bona fide* nature of the claim made by the landlord. In such circumstances, the learned counsel submits that the present application is hit by section 19 of the present Act. The learned counsel also cited in *Union of India* v. *Nanak Singh*[2], for the very same proposition. Mr. Viswanatha Rao also read *Veerasami Mudali* v. *Palaniappan*[3] and pointed out that the lower appellate Court has misconstrued the said decision. According to this decision, a Bench of our High Court has held that even though the suit has been dismissed for want of notice, the finding as regards the other aspects of the case will constitute *res judicata* in the subsequent proceedings filed after valid notice contemplated under the Act. With these submissions, the learned counsel for the petitioner herein submits that the present application for eviction is clearly barred under section 19 of the Act.

1. (1971) 2 S.C.J. 555 : A.I.R. 1971 S.C. 442.
2. (1968) 2 S.C.R. 887 : (1968) 2 S.C.J. 881 : A.I.R. 1968 S.C. 1370.
3. (1924) 46 M.L.J. 515 : A.I.R. 1924 Mad. 626.

7. Mr. Pichai, the learned counsel appearing for the respondent submitted that *Shankarlal* v. *Hiralal*[1], clearly states that a finding which is unnecessary for the disposal of the suit in respect of an issue raised will not be *res judicata* in a subsequent proceeding. In that Privy Council case, the Board has confirmed the finding of the Bench of the Calcutta High Court wherein it was held "that inasmuch as the Subordinate Judge in the Dhanbad suit had held that that suit did not lie by reason of the failure to comply with section 80, Civil Procedure Code, he was bound to dismiss the suit under Order 7, rule 11 of the Code and the findings of the Court on the merits were *obiter* and could not support a plea of *res judicata*". This decision, according to Mr. Pichai, has not been overruled in *Gangappa* v. *Rachawwa*[2], though it has been referred. Mr. Pichai next cited *Mathura Prasad* v. *Dossibhai*.[3] In that decision, it has been held:

> "A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not *res judicata* in the subsequent suit. Rankin, C.J. observed in *Tarini Charan Bhattacharjee* v. *Kedar Nath Haldar*[4]:
>
> The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se*, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontest-

1. A.I.R. 1950 P.C. 80.
2. (1971) 2 S.C.J. 555 : A.I.R. 1971 S.C. 442.
3. (1970) 2 S.C.J. 685 : (1970) 3 S.C.R. 830: A.I.R. 1971 S.C. 2355.
4. (1929) I.L.R. 56 Cal. 723 : A.I.R. 1928 Cal. 777.

ing that which has been finally decided."

8. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as *res judicata*. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute the question cannot operate as *res judicata* between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

The next decision cited by Mr. Pichai is *Rajagopal Transports* v. *Presiding Officer*[1]. In that decision. Ramaprasada Rao, J., has held:

"The essential requirement of the doctrine of *res judicata* is that both the Court which rendered the finding on an earlier occasion and the Court which is to compulsorily review the matter on a subsequent occasion, are competent Courts in the sense that they have the jurisdiction to entertain and adjudicate upon the *lis* or the subject-matter. If the earlier Court which gave its findings is incompetent to decide on merits on the ground that it lacked jurisdiction, then *ab initio* those findings of fact need not be looked into and much less acted upon."

9. No doubt, Mr. Viswanatha Rao, argued that section 10 (4) of the Rent Control Act does not take away the jurisdiction of the Court but only confers a right upon the tenant by making the landlord not to file eviction petition if they come under the purview of section 10 (4) of the Act. Mr. Viswanatha Rao also cited the decision reported in *Veerasami Mudali* v. *Palaniappan*[2], wherein it has been held that the question of the plaintiff's title was a matter substantially in issue between the parties and the decision of the same is final and cannot be reopened in a subsequent suit brought after due notice to quit. The learned Counsel also referred to *Muthu Pillai* v. *Veda Viyasa Chariar*[1], wherein it has been held that an adverse finding in prior suit, though ended in favour of the person who agitates the matter in a subsequent suit, will operate as *res judicata* as far as that finding is concerned.

10. There is no difficulty in accepting the said contention. But it is for the Court to find out as to whether the finding given by the Court on issues which are not necessary to dispose of the suit is an observation without the seal of finding or is *ab initio* void as per the provisions of the particular enactment. Section 10 (4) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 states:

"No order for eviction shall be passed under sub-section (3)—

(*i*) against any tenant who is engaged in any employment or class of employment notified by the Government as an essential service for the purposes of this sub-section unless the landlord is himself engaged in any employment or class of employment which has been so notified."

11. The prior eviction proceeding was dismissed because of this provision in section 10 (4). Subsequently, the landlord obtained exemption, as far as this section is concerned, from the Government under section 29 of the Act. After obtaining exemption, the landlord has filed the present eviction petition. It is unnecessary for the Rent Controller's Court, which decided the prior proceeding, to go into the question of *bona fides* inasmuch as section 10 (4) specifically states that no order for eviction shall be passed in such cases. When there is such a mandatory direction prohibiting the Court to pass any eviction order against that person who comes squarely under section 10 (4) (*i*) of the Act, the finding on other issues regarding the *bona fides* must be construed as *ab initio* void. In cases wherein want of notice was raised and the same was decided as

1. (1971) 1 M.L.J. 488.
2. (1924) M.W.N. 466 : 46 M.L.J. 515 : A.I.R. 1924 Mad. 626.

1. (1920) 12 L.W. 277 : 60 I.C. 397.

one of the issues along with other issues, there is no prohibition to go into such issues along with the question of want of notice. In those circumstances, the cases cited by Mr. Viswanatha Rao, held that the findings which went against a party concerned, even though he succeeded on the question of notice or lost on the question of notice, will constitute a bar for the subsequent proceedings on the same issues. In as much as the present finding in the prior proceedings has to be construed as *ab initio* void in view of section 10 (4) (*i*) of the Act, I am of the view that section 19 is not a bar for the present proceedings. Further in *Official Trustee* v. *S. N. Ghatterjee*[1], the Supreme Court has held:

> "It is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties."

Thus it is clear from the abovesaid decision that the Rent Control Court in the prior proceeding should not have decided the other issues in view of the clear prohibition contained in section 10 (4) (*i*) of the Act. In those circumstances, the civil revision petition is dismissed and the order of eviction passed by the Courts below is confirmed. There will be no order as to costs. Time to vacate two months.

R.S. — *Petition dismissed.*

1. (1969) 3 S.C.R. 92 : (1969) 2 S.C.J. 123: A.I.R. 1969 S.C. 823.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*V. Sethuraman, J.*

The State of Madras represented by the District Collector of Madurai .. *Appellant**

v.

R. K. Ramakrishnan and another .. *Respondents.*

Land Acquisition Act (1 of 1894), sections 4 (1) (2), 5 (A) and 6 (1)—Objection by person interested in land beyond period of thirty days—Effect.

Section 4 (1) of the Land Acquisition Act requires only the issue or publication of public action in the official gazette and also at convenient places in the locality and it does not contemplate any individual notice.

Only if there was objection within the period specified in section 5-A (1) of the Act there would be scope for making the enquiry under section 5-A (2). The mandatory requirements of section 5 A (2) would arise for consideration only in case there was a proper objection within the time contemplated by the Act. Rule 3 of the Rules framed by the Government under section 55 (1) of the Land Acquisition Act does not require any mandatory procedure to be followed and the failure to do so would not vitiate the proceedings under the Land Acquisition Act.

[*Paras* 9 *and* 10.]

Cases referred to :—

Belegal Gundachar v. *The State of Madras*, (1953) 2 M.L.J. 262; *The State of Madras* v. *Periakkal*, (1974) 2 M.L.J. 217 : 87 L.W. 602 : A.I.R. 1974 Mad. 383; *Sinnaiyan* v. *The Union Territory of Pondicherry*, (1971) 1 M.L.J. 342.

Appeal against the decree of the Court of the Subordinate Judge (II Additional), Madurai in Appeal Suit No. 260 of 1970 preferred against the decree of the Court of the District Munsif, Melur in Original Suit No. 128 of 1966.

* S. A. No. 222 of 1973.

15*th September*, 19[illegible]

The Additional Government Pleader, for Appellant.

K. R. Thiagarajan, for Respondent.

The Court delivered the following

JUDGMENT.—The suit, which gives rise to this second appeal by the defendant, was filed by two plaintiffs for recovery of possession of the plaint schedule property from the State of Madras represented by the Collector of Madurai and for recovery of damages of Rs. 1,000 for alleged wrongful demolition of the building that stood on that property.

2. One Dr. Venkatarama Iyer, who owned lands in R.S. Nos. 260 to 264, had an existing source of water supply from sluice No. 4 of Sakulam fed by the Periyar system. He and his relative desired that they should get direct supply of water from the Periyar channel distributory No. 3. He therefore moved the Public Works Department for the purpose of getting the change in the water supply. This involved the acquisition of certain lands measuring about 6 cents in R.S. No. 286/2 lying in Sennagarampatti Village belonging to the plaintiffs. The Government issued the notification under section 4 (1) of the Land Acquisition Act on the 6th of December, 1961. Section 4 (2) provides that whenever it appears to the Government that land in any locality was needed or was likely to be needed for any public purpose, a notification to that effect should be published in the Official Gazette and that the Collector should cause public notice of the substance of such notification to be given at convenient places in the said locality. Section 5-A (1) of that Act contemplates that any person interested in any land which has been notified under section 4 sub-section (1), as being needed or likely to be needed for a public purpose may, within thirty days after the issue of the notification, object to the acquisition of the land. The Collector proposed an enquiry under section 5-A by issuing the requisite notice, which was served on the plaintiffs on 1st June, 1962. The plaintiffs filed their objections on 16th June, 1962 and appeared before him on 18th June, 1962. Thereafter as contemplated by section 6 (1) of the Act, a declaration was made by the Government. As section 6 is somewhat material for our present purpose, it is necessary to extract it here:

> "6 (1). Subject to the provisions of Part VII of this Act, when the Government is satisfied, after considering the report, if any, made under section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders."

Before the declaration was made on 6th of February 1963 the plaintiffs filed Writ Petition No. 617 of 1961. It was dismissed even at the stage of admission. It is only thereafter that the enquiry under section 5-A came to be made. The plaintiffs came forward with a suit in 1966. In the plaint it was alleged that after filing of the objections on 18th June, 1962 there was no further information regarding the proposal of acquisition. It was further alleged that the plaintiffs had put up a building in the suit site at considerable cost and that the authorities had demolished it. According to the plaintiffs, the land acquisition proceedings were taken to benefit a set of influential persons so that the acquisition proceedings were vitiated by *mala fides*. It is on these facts that the plaintiffs prayed for recovery of the suit properties and also for damages for the demolition of the building.

3. The State of Madras, which was the defendant, denied that the acquisition proceedings were taken for a single individual. It pointed out that the objections of the plaintiffs had been considered, investigated and a report submitted thereon to the Government for a declaration. The Government overruled the objections and approved the declaration under section 6. The Government referred to the payment of compensation and submitted that the declaration made under section 6 (1) of the Land Acquisition Act was conclusive and final so that it could not be scrutinised by the Court.

4. The learned District Munsif dismissed the suit holding that the acquisition had

been done according to the provisions of law and that the plaintiffs were not entitled to recover possession of the property or for damages for the alleged wrongful demolition of a part of the building.

5. The plaintiffs appealed and the learned Subordinate Judge found that the land acquisition proceedings in respect of the suit land were illegal and were of no effect. For this purpose he relied on the new channel having been put up only to benefit certain private individuals. He further pointed out that a declaration under section 6 (1) would be vitiated by *mala fides* if it was passed by an authority without applying its mind at all, even though there was no evidence of any personal ill-will, corrupt motive or other improper purpose. He pointed out that after the filing of the objections by the plaintiffs no further enquiry had been made and no report had been submitted by the Tahsildar. Under these circumstances he held that the Department had not observed the rules under the Act which had the binding force of law in relation to the enquiry under section 5-A of the Act and as such, the declaration made under section 6 (1) was a nullity.

6. The Government has appealed and on its behalf the first objection taken is that the suit was barred by limitation under Article 100 or Article 113 of the Limitation Act of 1963. Article 100 provides that in order to alter or set aside any act or order of an officer of Government in his official capacity, a period of one year would be available from the date of the act or order of the office. In the present case, the notification under section 6 came to be issued on 8th February, 1963, and the period of one year would have lapsed by February, 1964. The objection of the learned counsel for the respondents was that Article 100 had no application, because the present suit was not for setting aside the notification issued under section 6, but was for the purpose of recovery of possession. This objection has found acceptance in the hands of the learned District Munsif. This point was not agitated before the learned Subordinate Judge. I find that the learned counsel for the respondents is right when he says that in the light of the frame of the suit, there was no question of Article 100 applying to the present proceedings. Article 113 provides for a period of three years from the time when the right to sue accrues. It is only after the award that possession was taken. The right to sue is one that accrued on dispossession. The suit is within three years of such dispossession.

7. The next contention urged by the learned counsel for the Government was that the lands had been acquired for a public purpose and not for the benefit of any private individual, as held by the learned Subordinate Judge. In this connection he brought to my notice the decision of a Bench of this Court in *Belegal Gundachar and another* v. *The State of Madras represented by the Collector of Bellary and others*[1]. It was pointed out in that case that the power of a state to acquire property compulsorily was a power to acquire it only for a public purpose and that the expression "public purpose" was not capable of a precise definition and had not a rigid meaning. An acquisition for carrying out an irrigation scheme would be entirely for a public purpose, which was a State purpose: In the said case it was pointed out that though initially a channel for which the land is acquired would serve only one part of land owned by a single individual, in course of time it would also serve the other lands as well, so that it must be held that the acquisition was for a public purpose namely, extension of irrigation. It was ruled that the fact that initially only one individual stood to benefit by the proposed channel would not make the acquisition any the less an acquisition for a public purpose. Having regard to this Bench decision, it would follow that even assuming that Mr. Venkatarama Iyer was a single individual proposed to be benefited still it would be a public purpose since aiding agriculture is a public purpose.

8. It is unnecessary, in this view, to go into the question whether the learned Subordinate Judge was right at all in proceeding as if the benefit was intended only for Dr. Venkatarama Iyer. It was

1. (1953) 2 M.L.J. 262.

pointed out for the Government that the benefit was likely to enure to a number of individuals, so that the learned Judge was not right in proceeding on the basis that he has done. There is substance in this submission.

9. The learned counsel for the respondents submitted that the whole of the proceedings under section 5-A were vitiated because the procedure under section 5-A (2) had not been followed in this case. In *The State of Madras represented by the Secretary to Government, Home Department, Madras-9* v. *Periakkal and others*[1]. it has been ruled that the provisions of rule 3 (*b*) of the Rules framed under section 55 (1) of the Land Acquisition Act in relation to the enquiry under section 5-A is not mandatory. In that case no notice had been given to the Department at whose instance the acquisition was initiated. The Court held that the failure to issue notice to the Department did not affect the validity of the enquiry. This decision relied on by the learned counsel for the Government does not, however, affect the controversy before me. Section 5-A (1) contemplates further enquiry only if objection is received from the person interested in the land notified under section 4 (1) within a period of 30 days after the issue of such notification. There is no dispute that in the present case this notification came to be issued on 6th December, 1961 and the objection came to be filed on 16th June, 1962. This objection is wholly beyond the time provided under section 5-A so that the mandatory character of section 5-A (2), if any, would not came up for consideration. In other words, only if there was an objection within the period specified in section 5-A (1) there would be scope for making the enquiry under section 5-A (2). The learned counsel for the respondents, in this connection, brought to my notice Exhibits A-4 and A-5. Exhibit A-4 is a notice issued on 19th April, 1961. This was submitted to be the notice contemplated by section 4 (1) to the individuals and in pursuance of it he filed the objection in Exhibit A-5 on 29th April, 1961 which is within the period of 30 days. The notice does not say under what provision it was issued. It was obviously with a view to make some further enquiry regarding the public purpose that the notice must have been issued. The suggestion for the respondent is that when once this objection is filed within the period of thirty days, then the provisions of section 5-A (1) are satisfied. I think there is no substance in this submission. The provisions of section 4 (1) require only the issue or publication in the Official Gazette and also at convenient places in the locality. It does not contemplate any individual notice so that the notice under Exhibit A-4 cannot be taken as a notice under section 4 (1). The mandatory requirements of section 5-A (2) would arise for consideration only in case there was a proper objection within the time contemplated by the Act. Therefore, there is no substance in the objection of the learned counsel for the respondents that the mandatory provisions of section 5-A have not been complied with here.

10. The next point that was submitted was that section 6 of the Land Acquisition Act requires submission of a report to the Government and the consideration of that report by the Government. Unless such a report is received by the Government, the argument runs, the Government cannot make any declaration under section 6. For this purpose my attention was drawn to a decision in *Sinnaiyan and others* v. *The Union Territory of Pondicherry represented by the Under-secretary to Government, Revenue and Development Department, Pondicherry and another*[1]. In that case it was pointed out that from rule 3 of the Rules framed by the Government under section 55 (1) of the Land Acquisition Act, it was clear that the objector has got an opportunity to know, at the time of the enquiry under section 5-A what answer, if any, the Department, for whom the acquisition was proposed, had given with regard to his objection. On coming to know at the time of the enquiry how the objections were sought to be met, the objector, it was held, got an opportunity to adduce evidence in support of his objections. In the case before the Court, the petitioner had no opportunity to know the answer given by

1. (1974) 2 M.L.J. 217 : 87 L.W. 602 : A.I.R. 1974 Mad. 383.

1. (1971) 1 M.L.J. 342.

the concerned department. The mandatory provisions contained in rule 3 were, it was held, violated as the enquiry was not conducted in accordance with the provisions of the Act. This decision is inconsistent with the Bench decision of this Court reported in *Periakkal's case*[1], to which I have already referred. In that case it was held that there was nothing mandatory in rule 3 (*h*) which is the Rule applicable to section 5-A proceedings. In view of this Bench decision, I am unable to hold that the provisions of rule 3 require any mandatory procedure to be observed, the failure to do which would vitiate the proceedings under the Land Acquisition Act. But the provisions of section 6 (1) require the submission of and consideration of a report only in case there was one. As I have held, in the present proceedings the provisions of section 5-A were not attracted because there were no objection filed within the period of thirty days, there was no need for any report under section 5-A. There is no transgression of the provisions of section 6 here. In the circumstances, the acquisition is proper and the learned District Munsif rightly dismissed the suit.

11. The appeal is, therefore, allowed. No order as to costs. No leave.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Mangalam Pillai and others .. *Appellants**

v.

C. S. Appavoo Udayar and others .. *Respondents.*

Construction of documents—Suit for specific performance—Document of reconveyance—Contemporaneous with document of sale—Interpretation in conjunction with contemporaneous documents and conduct of parties—Time fixed for reconveyance—No scope for equitable considerations—Limitation.

If an instrument is contemporaneous in point of time with other documents and if these two sets of documents have been understood and acted upon by the parties in a particular manner, then even though the letters and writings of such document may *prima facie* give a particular meaning to it, yet the same has to be in conjunction with such contemporaneous documents and be interpreted in the light of the subsequent conduct of the author of the said documents. [*Para.* 7.]

In the instant case, the question came up as to whether an agreement to reconvey a property executed at the time of sale of the property was actually an agreement to convey or recover the suit property.

Held (on facts) :

Though the lettering *prima facie* gave the impression that it was an agreement of sale, yet the parties intended that it was an agreement of reconveyance. [*Para.* 9.]

In cases where the parties contemplate to reconvey the property purchased by them and such an agreement of reconveyance is contemporaneous with the primary sale of the property, and there is a stipulation in the agreement of reconveyance that certain things have to be performed within a certain time and in accordance with certain stipulations, then such covenants including the stipulation as to time has to be respected to the last letter; and equity will not interfere and extend its arm of sympathy by varying or modifying the express stipulation conditions and covenants of such a contract of reconveyance. In such cases, equity arrays itself with common law and enforces such agreements of reconveyance in accordance with its tenor and strict conditions.

[*Para.* 10.]

Cases referred to:—

Pandit Chunchum Jha v. *Sheikh Ebadan Ali*, 1954 S.C.J. 469 : (1954) 1 M.L.J. 708 : (1955) 1 S.C.R. 174 : A.I.R. 1954 S.C. 345 ; *Prem Agnani* v. *Sub-Registrar, Bangalore*, (1974) 2 Kant. L.J. 450 : A.I.R. 1975 Karn. 1; *Shanmugham Pillai* v. *Annalakshmi*, (1950) 1 M.L.J. 683 : 1950 S.C.J. 1 : 1949 F.C.R. 441 : A.I.R 1950 F.C. 38 ; *Balasundara* v. *Muthuvenkatachalam*, I.L.R. (1954) Mad. 926 : (1952) 2 M.L.J. 141 : A.I.R. 1954 Mad. 799 ; *Simrathmull* v. *Nanjalingaiah*, A.I.R. 1963

1. (1974) 2 M.L.J. 217 : A.I.R. 1974 Mad. 383.

*A. No. 290 of 1970. *24th October,* 1975.

S.C. 1182 ; *Caltex* v. *Bhagwan Devi*, (1969) 1 S.C.J. 283 : (1969) 2 S.C.R. 238 : A.I.R. 1969 S.C. 405.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli in Original Suit No. 298 of 1966.

T. R. Ramachandran and *T. R. Rajagopalan*, for Appellants.

Row and *Reddy* and *M. P. Subbaiah*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The first to the fourth defendants in O.S. No. 298 of 1966 in the Court of the Subordinate Judge of Tiruchirapalli, are the appellants. The plaintiff, one C. S. Appavoo Udayar filed a suit for the specific performance of a contract under which the first defendant purported to convey the suit property for a sum and consideration of Rs. 11,500. The plaintiff also sought for re-delivery of possession of the suit properties and for a direction as against the first defendant to account for the mesne profits ever since the date he was dispossessed of the properties to the date of actual re-delivery of possession. The relevant facts which led to the institution of the suit for specific performance of 3rd October, 1966 are as follows :—

2. Under Exhibit A-1, dated 2nd May, 1962 the plaintiff mortgaged certain properties not covered by the suit. It was discovered that the plaintiff did not have any title to such properties. Consequent upon such a mis-conduct and mis-representation on the part of the plaintiff, and as the first defendant's security was in jeopardy, he gave a complaint to the police for cheating as against the plaintiff, under section 420, Indian Penal Code. Thereafter, the parties adjusted their serious differences in and by which the plaintiff agreed to execute a sale deed over the suit properties and did execute the sale deed under Exhibit A-3, dated 4th January, 1964 for a sum and consideration of Rs. 10,000. This document was registered as document No. 259 on 21st April, 1964. It may be of interest to note that consequent upon the adjustment of differences as above outside Court, the criminal case by then laid by the first defendant as against the plaintiff was dismissed and the plaintiff was discharged on 31st December, 1963. It is common ground that during the period of negotiations as above the necessary stamp papers for the sale of the suit properties by the plaintiff to the first defendant were purchased on 22nd and 31st of December, 1963. Though the sale deed was executed on 4th January, 1964 under Exhibit A-3, it was registered contemporaneously with another agreement Exhibit A-4, dated 8th January, 1964 in and by which the first defendant agreed to sell back the suit properties within one year from the date of execution of the sale deed Exhibit A-3. It is not in dispute that the plaintiff never made it appear that he was interested in the re-purchase of the property during the period of one year which was the period agreed upon for the reconveyance of the property by the first defendant to the plaintiff. As within the period contemplated for purchase under Exhibit A-4 the plaintiff did not seek for a reconveyance thereof, the first defendant sold the suit properties under Exhibit A-7, dated 29th November, 1965 to defendants 2 to 4, who thereafter transferred the properties in favour of the 5th and 6th defendants. The plaintiff's case as pleaded in the Court below is that the sale deed Exhibit A-3 is not a sale at all and if at all one it is void under sections 23 and 16 of the Contract Act. His case is that he was coerced and compelled to execute the sale deed and he had not the necessary intent to convey title thereunder. In any event he would aver that the term of one year provided for the reconveyance of the property under Exhibit A-4 is not the essence of the contract and even the terms of Exhibit A-4 literally interpreted would only give the impression that it is an agreement to convey immoveable property which was the subject-matter of an earlier sale and not an agreement to reconvey. As in the case of contracts to convey immoveable property, time is never understood as the essence of the bargain, the first defendant cannot escape the legal liability to sell the property in accordance with the terms of Exhibit A-4 and that his later dealings under Exhibit A-7 whereby he conveyed the property to defendants

2 to 4, who in turn transferred the same to defendants 5 and 6 are inoperative and not binding on the plaintiff. It is said that the plaintiff was dispossessed from the properties on 4th April, 1966 and in that view all the defendants are liable to render an account for the mesne profits. The plaintiff admits that the first defendant did sell the properties under Exhibit A-7 to defendants 2 to 4 and that he objected to the registration of the documents executed by the first defendant in connection with the sale of the suit property by him to defendants 2 to 4. The plaintiff avers that he is ready and willing to deposit into Court the agreed sum of Rs. 11,500 as per the agreement Exhibit A-4, dated 8th January, 1964, and claims the usual decree for specific performance.

3. The defendants on the other hand would aver that the sale Exhibit A-3 is fully supported by consideration, as the recitals therein disclosed that there were pre-existing debts of the plaintiff which were paid off and discharged from and out of the sale consideration. The case of the plaintiff that the sale deed had taken place by misrepresentation and fraud and in order to stifle prosecution is denied. The first defendant expressly denies that he is guilty of any flagrant breach of trust nor has he abused the confidence alleged to have been placed in him by the plaintiff. The first defendant's case is that he let in the plaintiff's son as his lessee of the suit properties soon after the purchase and had to institute proceedings before the Revenue Court to evict him from the suit properties as he failed and neglected to pay the rent payable to the first defendant as lessee and that it was in such proceedings that he took possession of the properties on 4th April, 1966 from the plaintiff's son. The first defendant reiterates that his sale of the properties under Exhibit A-7 to defendants 2 to 4 and the dealings by them thereafter by which they transferred the properties to defendants 5 and 6, are all independent transactions which cannot be questioned or challenged by the plaintiff. The first defendant states that under Exhibit A-4 which was a document contemporaneously registered along with Exhibit A-3 the plaintiff acquired only a right of reconveyance and not a right to convey as alleged and in these circumstances, the demonstrable intention between the parties was that time prescribed under Exhibit A-4 for such re-purchase should be the essence of the contract. As the plaintiff did not seek for any such reconveyance within the year, nor has he called upon the first defendant to execute such a deed of reconveyance within the time prescribed, the plaintiff has lost his right to seek for specific performance and that, therefore, the suit is misconceived.

4. On the above material pleadings the following issues were framed.

1. Was the deed, dated 4th January, 1964 by the plaintiff in favour of the 1st defendant not an out and out sale?

2. Is the plaintiff entitled to get reconveyance of the suit properties for all or any of the reasons stated in the plaint?

3. Are the defendants 2 to 6 *bona fide* alienees entitled to protection?

4. Is the plaintiff entitled to rendition of accounts?

5. Is the suit barred by limitation?

6. To what relief, if any, is the plaintiff entitled?

(Additional Issues framed on 6th July, 1968.)

Is the suit not properly valued?

5. The learned Judge held that the first defendant did acquire a valid marketable title to the suit properties under Exhibit A-3, and that it was not vitiated by misrepresentation, fraud or coercion as alleged by the plaintiff and it is not hit either by section 23 or section 16 of the Contract Act. On issue 2, he found that the plaintiff was entitled to get the conveyance of the suit properties from the defendants, as, on a literal reading of Exhibit A-4, the learned Judge was of the view that Exhibit A-4 cannot be understood or interpreted as an agreement of reconveyance but only as an agreement of conveyance. He found that defendants 2 to 4, are not *bona fide* alienees of the suit properties and that they are not entitled to any protection by reason of the purchase of the suit properties under the registered document Exhibit A-7, dated 29th November, 1965. He held that the suit for specific performance was not barr-

by limitation and found issue 4 regarding the rendition of accounts in favour of the plaintiff. He agreed with the plaintiff that the suit for specific performance has been properly valued and in the result, he passed the usual decree for specific performance directing defendants 1 to 4 to execute a registered sale deed in respect of the suit properties in favour of the plaintiff and gave incidental directions to the plaintiff to deposit the agreed amount into Court to enable him to obtain the reconveyance. The usual default clause was provided for. He also gave a direction to defendants 1 to 4 to render an account to the plaintiff for the profits derived from the suit properties from the date of dispossession, namely 4th April, 1966 till the date of delivery of possession. Certain consequential reliefs were also given in favour of the plaintiff whereby the dealings *inter se* as between defendants 1 to 4 on the one hand and defendants 5 and 6 on the other, were rendered invalid. It is as against this judgment and decree that the present appeal has been filed.

6. Mr. T. R. Ramachandran, learned counsel for the appellants wants us to consider the entirety of the circumstances instead of solely relying upon the words and content of Exhibit A-4 to apprise the situation. According to him the expression திரய உடன்படிக்கை used in Exhibit A-4 has to be read in conjunction with the conduct of the parties and particularly that of the plaintiff and his son. He would also refer to the oral evidence let in and particularly the silence of the plaintiff during the period of one year provided for under Exhibit A-4 and urge that what was in contemplation of the parties was an agreement of reconveyance and not an agreement of conveyance. According to him the privilege gained by the plaintiff by reason of the above re-purchase has become extinct with the lapse of the period of one year and he cannot on out of place considerations seek for specific performance of a contract which has become extinct after efflux of the prescribed time. Though the words மறுதிரயம் do not find a place in Exhibit A-4, the legal right secured by the plaintiff under Exhibit A-4 has to be understood along with the surrounding circumstances of the case. Contending *contra*, the learned counsel for the respondent would urge that the suit agreement Exhibit A-4 should be considered as an agreement which is independent of the sale under Exhibit A-3 and in the absence of the expression reconveyance in the agreement to convey, the Court should not stretch the legal effect of the documents so as to find a case in favour of the appellants. Relying on the well-known principle that a document has to be construed on its own terms and as Exhibit A-4 is an agreement of sale and not an agreement of re-sale the occasion to consider contemporaneous facts does not arise. In effect, the learned counsel's argument is that having regard to the evidence both oral and documentary in this case the intention of the parties cannot be brought to bear on the reality of the situation and the plaintiff denied the right to secure the specific performance of the contract under Exhibit A-4.

7. It is no doubt true that in the matter of interpretation of documents Courts are guided primarily by the letter in which it is couched. The writing which produces the instrument often takes precedence in the matter of the understanding of the true meaning of the document. But a well set exception is always carved out to this accepted *norm*. If such an instrument is contemporaneous in point of time with other documents and if these two sets of documents have been understood and acted upon by parties in a particular manner, then even though the letters and writing of such document may *prima facie* give a particular meaning to it, yet the same has to be in conjunction with such contemporaneous documents and be interpreted in the light of the subsequent conduct of the authors of the said documents. The best and the surest mode of construing an instrument is to read in the sense which would have been applied when it was drawn up. Though this principle *contemporance expositio est optima Fortissima in Lege* cannot, as a matter of course, be adopted in the interpretation of statutes by referring to contemporaneous events which led to the passing of the statutes yet the intention of the parties, when they wrote a document, which is in the midst of other documents, might be gathered

and further elucidated by the conduct they have pursued. As has been said by modern authorities, "the rule appears to be that, however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used ; for so the parties thereto must be supposed to have intended."

8. As each case has to be decided on its own facts, it cannot be laid down with precision that the language deployed in an instrument should govern in all circumstances and for all times notwithstanding the fact the parties who had occasion to refer to it intended that it should be understood in a specified way. If there is such evidence of supervising conduct by the parties, then notwithstanding the express nature of the words used in an instrument, such surrounding circumstances might be taken into consideration in order to understand the legal effect of the word used by the parties in the instrument, *மறு கிரயம்.*

9. The learned counsel for the respondent referred to the decision in *Pandit Chunchun Jha* v. *Sheikh Ebadan Alin and another*[1]. The principle laid down by the Supreme Court in the above decision is unassailable. The Supreme Court said :

> "If the words are express and clear effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. If however there is ambiguity in the language employed then it is permissible to look to the surrounding circumstances to determine what was intended."

In the instant case the parties having used the words "*கிரய உடன்படிக்கை*" understood the same as "*மறுகிரயம்*". This later understanding of the meaning and purpose of Exhibit A-4 cannot be lightly brushed aside. The first defendant filed a petition before the Revenue Court, Tiruchirapalli, for eviction of the plaintiff's son who defaulted in the payment of rent of the suit lands which were leased out by the first defendant after purchase under Exhibit A-3. This was nearly a year after the purchase. The plaintiff's son set out the circumstances under which the sale Exhibit A-3 was executed and would say in Exhibit B-3 as follows :

> "In pursuance of the said arrangement this respondent's father executed a sale deed in favour of the petitioner on 8th January, 1964. On the same date the petitioner executed an agreement in favour of this respondent's father *agreeing to reconvey* the property on payment of Rs. 11,500 within a year."

The plaintiff would own the contents of Exhibit B-3 and would swear that it was he who conducted the said proceedings with the assistance of his own lawyers. He would clearly say that he engaged the lawyer Mr. Sankara Iyer in the Revenue Court and instructed him to file the counter which was filed by his son. Again the plaintiff had an opportunity for a second time to clearly set out what was the intention of the parties when Exhibit A-4 was entered into. Exhibit A-8 is a statement of objections filed before the Sub-Registrar of Assurances, Tiruchirapalli at a time when the first defendant was selling the suit properties, to the second to the fourth defendants under Exhibit A-7. In that statement Exhibit A-8 the plaintiff stated as follows :

> "The said N. Mangalam Pillai has entered into an agreement with me on 8th January, 1964 for *re-sale* of the said property in my favour and I am ready and willing to purchase the same. Any sale in favour of .... third parties will not be binding on me. Hence I object to the registration of any sale deed in respect of the above property by N. Mangalam Pillai."

Here again, the plaintiff understood that Exhibit A-4 was an agreement of re-sale. He refers to Exhibit A-8 in his evidence. He had legal advisers even at this stage. According to him Exhibit A-8 was presented by his Vakil on his instructions. Even in his chief examination he uses the word "*மறுகிரயம்*" as the basis of the agreement under Exhibit A-4. According to him the parties understood Exhibit A-4 thus: "*அந்த அக்ரிமெண்டில் நான் ஒரு வருடத்திற்குள் ரூ. 11,500டி 1க்கு செலுத்தினால் டி-1 என்பேருக்கு தாவா சொத்தை மறுகிரயப் பத்திரம் ரிகய*

1. 1954 S.C.J. 469 : (1954) 1 M.L.J. 708 : (1955) 1 S.C.R. 174 : A.I.R. 1954 S.C. 345.

பத்திரம் எழுதிக்கொடுக்க வேண்டு மென்று இருந்தது.''

The learned counsel for the respondent explains away the above situations and statements by interested persons including the plaintiff by stating that they would not have understood the implication of the term "*மறுகிரயம்*" or reconveyance. We are unable to accept this explanation. The course of conduct of parties, who could speak on Exhibit A-4, its intent and purpose, reaffirms the obvious in Exhibits B-3 and A-8. They accept that the only intention of the parties, when Exhibit A-4 was executed, was that the suit properties had to be reconveyed within a year, if the plaintiff were to pay off the agreed consideration. The plaintiff cleverly explained away in the witness box that what was agreed to in Exhibit A-4 was an independent agreement of sale and it had no nexus to the primary sale and it did not result in an agreement for re-sale. Reference is also made by counsel to a decision of the Karnataka High Court in *Prem Agnani* v. *Sub-Registrar, Bangalore*[1], wherein the well known cardinal rule of construction that an instrument has to be considered as a whole and the intention of the parties has to be ascertained by the terms thereof and not by the extraneous circumstances or evidence has been reiterated. But in a case like the one before us, if the surrounding circumstances do form an integral part of one and the same transaction, then all such events put together are so knitted that we are constrained to examine the resultant fabric of such events to find out what the parties intended. The ambiguity in this case arises by necessary implication because the parties themselves at all material times understood Exhibit A-4 as an agreement of reconveyance and not as an agreement of sale. We, therefore, agree with the learned counsel for the appellants that though the lettering of Exhibit A-4 *prima facie* gives the impression that it was an agreement of sale, yet the parties intended that it was an agreement of reconveyance. We may in passing refer to another fact which is also a pointer to our conclusion that both Exhibit A-3 and Exhibit A-4 were registered on the same date in the same office of the Sub-Registrar of Assurances.

10. The next question for consideration is whether the agreement of reconveyance as contained in Exhibit A-4 would enable the plaintiff to overlook the covenants therein and seek for specific performance of such a contract on the only ground that time cannot be the essence of a contract of a sale of immovable property. Admittedly, the suit for specific performance was filed on 3rd October, 1966, which is long after the agreed period during which the plaintiff could seek for specific performance of the contract of reconveyance. In all cases where the subject-matter of the bargain is immovable property, the accepted rule is that even if the parties agreed that such a contract should be performed within an agreed period of time, then such time would not be the essence of the contract. This being a well-accepted rule, authorities need not be cited. But even to this well known equitable doctrine, there is an exception. In cases where the parties contemplate to reconvey property purchased by them and such an agreement of reconveyance is contemporaneous with the primary sale of the property, and if there is a stipulation in the agreement of reconveyance that certain things have to be performed within a certain time and in accordance with certain stipulations, then such covenants including the stipulation as to time has to be respected to the last letter, and equity will not interfere and extend its arm of sympathy by varying or modifying the express stipulations conditions and covenants of such a contract of reconveyance. In such cases, equity arrays itself with common law and enforces such agreements of reconveyance in accordance with its tenor and strict, conditions. The reason behind this leaning of equity towards the common law is but too clear. If a specific time is agreed upon under the terms of the reconveyance, within which the parties who could claim performance of such an agreement could claim it, then he can do so only within the prescribed time. The right to re-purchase is equitable to an option or a privilege granted to the vendor in the primary sale to seek for such reconveyance. As privileges cannot be gained at the whim and fancy of the grantee, he should be alert

1. (1974) 2 Kant.L.J. 450 : A.I.R. 1975 Karn. (S.B.) 1.

and seek for its performance. A prescription as to time in an agreement of reconveyance cannot be made elastic as by the end of the definite time fixed for its performance, there is an automatic lapsing of that privilege and the loss of the option in the grantee of the same. By reason of such a stipulation the title of the purchaser under the primary sale is kept in abeyance till the expiry of the period within which time the grantee of the privilege can obtain reconveyance of the property by seeking for specific performance of the agreement of reconveyance. This nebulous state of affairs in the title of the purchaser under the primary sale cannot be kept in abeyance for a length of time beyond the prescribed period of time agreed upon between the parties. This would result in the purchaser being asked to wait without justification and a look to the convenience of the grantee of the privilege to seek for specific performance of the agreement of reconveyance.

11. We shall now refer to the ratio in the appropriate cases touching upon the legal point under consideration. The Federal Court in *Shanmugam Pillai v. Annalakshmi*[1], observed as follows :

> " The agreement reserved an option to *A* to repurchase the property and was in the nature of a concession or privilege on fulfilment of certain conditions with a proviso that in case of default the stipulation should be void. *A* not having paid the instalments punctually according to the terms of the contract the right to repurchase was lost and could not be specifically enforced. It was not in the nature of penalty and the Court had not power to afford relief against forfeiture for its breach."

A division Bench of our Court in *Balasundara v. Muthuvenkatachalam*[2] observed that time must be and is of the essence of the contract where the parties have proceeded on the basis that there was a completed sale and a contemporaneous agreement to reconvey. In *Simrathmull v. Nanjalingaiah*[1], the Supreme Court, after finding that the sale deed and the deed of re-conveyance were parts of the same transaction, observed thus :

> " It is true that equity relieves against penalties when the intention of the penalty is to secure payment of a sum of money or attainment of some other object, and when the event upon which the penalty is made payable can be adequately compensated by payment of interest or otherwise. Thus relief is granted in equity against the penalty is a money bond, and also against penal sums made payable on breach of bonds, covenants and agreements for payment of money by instalments, or for doing or omitting to do a particular act. But where under a contract, coveyance, or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner or at stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident or surprise, equity will not relieve against a breach of the terms."

Lastly, in *Caltex v. Bhagwan Devi*[2]. The Supreme Court said thus :

> " At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain, the reason being that a renewal of a lease is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited for the purpose .... A delay on the part of the lessee to apply for renewal arising by mere neglect on his part and which could have been avoided by reasonable diligence will not entitle him to claim renewal."

1. (1950) 1 M.L.J. 683 : 1950 S.C.J. 1 : (1949) F.C.R. 441 : A.I.R. 1950 F.C. 38.
2. I.L.R. (1954) Mad. 926 : (1952) 2 M.L.J. 141 : 67 L.W. 329: A.I.R. 1954 Mad. 799.

1. A.I.R. 1963 S.C. 1182.
2. (1969) 1 S.C.J. 783 : (1969) 2 S.C.R. 238 : A.I.R. 1969 S.C. 405.

It is, therefore, abundantly clear from the ratio in the above decisions that equity will not relieve against a breach of the terms of a contract for reconveyance of immoveable property contemporaneously entered into at the time when the primary sale was effected. Such an option or privilege which the beneficiary gains cannot be lightly treated by the grantee, to his advantage. In order to claim equity, a party should do equity. A party in default cannot, a *fortiori*, claim an equitable right and seek for the extension of the time for performance of the contract of reconveyance on equitable considerations. By reason of the agreement of reconveyance, he obtains a concession and in order to gain the concession he should not only be alert but should be diligent in claiming the entitlement.

12. In the instant case it is common ground that the plaintiff did not seek for the specific performance of the contract of reconveyance within a period of one year expressly stipulated for, as the time for such enforcement of the right under Exhibit A-4. He did not give the impression that he was ready and willing to perform his part of the contract within the stipulated time. There was no notice asking for such performance nor was there any offer made that he intends to obtain reconveyance of the properties. He knew when he objected under Exhibit A-5 that the first defendant was dealing with the properties to his prejudice. Exhibit A-7 was the deed of sale executed by the first defendant in favour of defendants 2 to 4 in November, 1965. The plaintiff ought to have filed the suit for specific performance at the latest by April, 1965. But he comes to Court nearly two years thereafter and does not afford any explanation for his indiligence and delay. He issues the suit notice Exhibit A-17 only on 20th April, 1966, which was replied to promptly by the first defendant under Exhibit A-18, dated 2nd May, 1966. Even then he waits for another five months to bring the action. This unexplained delay is another factor to be taken into consideration while applying the common law rule stated above. We are, therefore, constrained to agree with the appellants that in the fact and in the circumstances of the case, Exhibit A-4 cannot be construed as an independent agreement of sale but is only an agreement of reconveyance which was entered into contemporaneously with the primary sale of the suit lands under Exhibit A-3 and that the plaintiff having not availed himself of the concessions or the privilege granted to him under Exhibit A-4 within the limited time, he has lost it and he cannot, therefore, seek for specific performance of that concession after the lapse of a year from the date of registration of Exhibit A-4 which is dated 21st April, 1964.

13. The lower Court found that the sale in favour of the first defendant under Exhibit A-3 was valid and that the sale was not vitiated by undue influence, coercion or fraud. We have already seen that the sale was agreed to long prior to the date when the plaintiff was discharged in the criminal case. We agree with the other findings of the Court below but we differ from its finding in so far as it held that time was not the essence of the contract and that Exhibit A-4 is an independent agreement of sale and the plaintiff could seek for specific performance of the same in equity after a reasonable time. We reverse the decision of the Court below in so far as this aspect of the case is concerned and hold that time is of the essence of the contract of reconveyance (Exhibit A-4) and the plaintiff having failed to come to the Court within the agreed time, he has lost the right to seek for specific performance of the contract. In the above view the subsequent sales made by the first defendant in favour of defendants 2 to 4 and the supervening transactions indulged in by defendants 2 to 4 in favour of defendants 5 and 6 cannot be challenged by the plaintiff. In consequence the defendants are not liable to account to the plaintiff for any period of time as was found by the Court below which direction followed the finding of the Court that the plaintiff could seek for specific performance even beyond the time prescribed in Exhibit A-4 as in equity he can seek for it. We, therefore, set aside the judgment of the Court below in so far as it held that the appellants are liable to account from 4th April, 1966 which is the date when the first defendant secured possession of

the properties from the plaintiff's son as lessee thereof. We also hold that defendants 2 to 4 are *bona fide* purchasers for value without notice of any defect in the first defendant's title.

14. In the result, we hold that the plaintiff is not entitled to a decree for specific performance and dismiss the suit, but in the peculiar circumstances of this case we direct that the parties do bear their own costs in this appeal and in the lower Court.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Special Original Jurisdiction.)

PRESENT :—*G. Ramanujam, J.*

V. R. Ramakrishnan, Sri Ramakrishna Bus Service, Wallajabad and others .. *Petitioners**

v.

The State of Tamil Nadu, represented by the Secretary to Government, Home Department, Madras-9 and others .. *Respondents.*

Motor Vehicles Act (*IV of* 1939), *sections* 68-D, 68-F—*Draft scheme of nationalisation — Approved— Temporary permits issued to operators cancelled— Validity— Rules for application by State Transport Corporation not published— No bar to grant of permit under the Act— Petitions claiming fundamental right to ply vehicles till pucca permit was granted to State Transport Corporation— Claim not valid— Constitution of India* (1950), *Article* 19 (1) (g).

The failure of the Government to make rules prescribing the manner of application for a permit by a Transport undertaking will not take away the power of the Transport authority to issue a permit or the right of the Transport undertaking to get a permit under section 68-F (1) of the Motor Vehicles Act. The undertaking can apply for a permit under section 68-F even in the absence of rules prescribing the manner of publication, and the applications filed by it cannot be said to be invalid or incompetent.

[*Paras.* 16 *and* 17.]

Once the schemes for nationalisation are approved and published as contemplated under section 68-D (3) and those schemes were not challenged, the petitioners who had no valid permits under section 12 (1) of the Act had no fundamental rights to be infringed by the Transport undertaking plying its buses under the permits issued to it by the Transport authority even without the aid of the requisite rules prescribing the manner of application for permit. [*Para.* 19.]

Cases referred to :

Srinivasa v. *State of Mysore*, 1960 S.C.J. 1092 : (1960) 2 S.C.R. 130 : A.I.R. 1960 S.C. 350 ; *Royappa Gounder* v. *Commercial Tax Officer*, (1967) 2 M.L.J. 546 : A.I.R. 1968 Mad. 274 ; *Murugesan* v. *Collector of North Arcot*, (1966) 2 M.L.J. 290 ; *Dhani Devi* v. *S. B. Sharma*, (1969) 2 S.C.R. 507 : (1970) 2 S.C.J. 157 : A.I.R. 1970 S.C. 759 ; *Deep Narain* v. *State of Bihar*, A.I.R. 1960 Pat. 575 ; *Dargah Committee, Ajmer* v. *State of Rajasthan*, (1962) 2 S.C.R. 265 : (1962) M.L.J. (Crl.) 321 : (1962) I S.C.J. 583 : A.I.R. 1962 S.C. 574 ; *Rex* v. *Lincolnshire Appeal Tribunal, Stubbins Ex parte*, (1917) 1 K.B. 1; *Abdul Gaffoor* v. *State of Mysore*, (1962) 1 S.C.R. 909 : (1963) 1 S.C.J. 480: A.I.R. 1961 S.C. 1556; *Kalyan Singh* v. *State of Uttar Pradesh*, (1963) 1 S.C.J. 50; A.I.R. 1962 S.C. 1183: *Sobhraj Odharmal* v. *State of Rajasthan*, (1963) 2 S.C.J. 188: A.I.R. 1963 S.C. 640 ; *Samath Transport Co.* (*P.*) *Ltd.* v. *The Regional Transport Authority, Nagpur*, (1961) 1 S.C.R. 631 : (1961) 1 S.C.J. 368 : A.I.R. 1961 S.C. 93 ; *Sahir Ahmed* v. *State of Uttar Pradesh*, A.I.R. 1954 S.C. 707.

Petitions praying that in the circumstances stated therein and affidavits filed therewith the High Court will be pleased to issue (1) writ of *mandamus* forbearing the respondents in all the petitions from interfering with the petitioners' plying of their vehicle /stage carriage (1) MDH 3229 on the route Madras (Broadway) to Kancheepuram (2) MDH 2361 on the route Madras (Broadway) to Vaiyaur, (3) MSX 4612 on the route Madras (Broadway) to Mahabalipuram, (4) MSR. 2766 on the route Madras (Broadway) to Vilambur,

*W.P. Nos. 3558 to 3563, 3565 to 3577, 3607, 3608, 3766, 3767, 3768, 3773, 3774, 3777, 3778, 3780, 3781, 3784, 3785, 3789, 3790, 3791, 3794, 3795, 3901, 3933 to 3937, 3964 to 3967, 3834, 3758 and 3689 of 1974. 10*th December*, 1974.

(5) MDH. 5995 on the route Madras (Broadway) to Vilambur, (6) TNH. 3535 on the route Madras (Broadway) to Mahabalipuram, (7) TNH 2779 on the route Madras (Broadway) to Cheyyar, (8) MDY 4954 on the route Madras (Broadway) to Madambakkam, (9) TNH 262 on the route Madras (Broadway) to Mahabalipuram, (10) MDF 4115 on the route Madras (Broadway) to Ariyur (11) MDH 2599 on the route Madras (Broadway) to Madambakkam, (12) MDH 3575 on the route Madras (Broadway) to Kancheepuram, (13) MDH 6006, (14) MDH 5626, 5627, TNH 727, MDH 3555, MDH 4545 on the route Madras (Broadway) to Kancheepuram, (14) MDH 2532 on the route Madras (Broadway) to Tirumuzhi, (15) MDV 7192, MSX 6224 on the route Madras (Mint) to Uthukottai, (16) MDJ 4359, MDJ 3979 on the route Madras to Arni (via.) St. Thomas Mount, (17) MDY 6703, TNJ 3292 on the route Madras—Panapakkam, (18) MSR 2774 on the route Madras Broadway to Sadras and (19) MDH 3427 on the route Madras (Broadway) to Tindivanam unless and until rules are framed by the State Government under section 68-F (1) of the Motor Vehicles Act 1939 and permits are duly issued under section 68-F (1) of the Act and rules made therein to the Pallavan/Anna Transport Corporation Ltd. in regard to the petitioner's route referred to above (in W.P. Nos. 3558 to 3563, 3565 to 3577, 3607, 3608 3767, 3768, 3784, 3785, 3758 and 3689 of 1974).

II. writs of *mandamus* directing the Regional Transport Authority, Thondaimandalam to maintain the *status quo* by permitting the petitioner in each of the petitions to operate their stage carriage (1) MDH 3692 on the route Madras to Elapakkam, (2) MDH 5679, MSW 5927, MDR. 4510 on the route Madras to Tindivanam under temporary permit, (3) MDY 5996 on the route Thandarai to Madras, (4) MDY. 6456 on the route Madras to Ambattur, (5) MSV 4543 on the route Madras to Thandarai, (6) MSW 853 on the route Madras to Uthukottai (W.P. Nos. 3766, 3789, 3791, 3964, 3965, 3966 and 3967 of 1974).

III. writs of *mandamus* directing the second respondent in all the petitions (first respondent in W.P. No. 3834/74) to issue temporary permit to the petitioner's vehicle (1) MSV. 992 to ply on the route Madras to Arkonam, (2) Tiruporur to Kaplambadi, (3) MDM 4049 to ply on the route Madras to Thakkolam, (4) MDH 5752, MSS 7112 to ply on the route Madras (Broadway) to Tiruttani *via.*, Red Hills and Tiruvallur, (5) TNH 1539 to ply on the route Madras to Arkonam, (6) MDH 4600, MSR 1975 to ply on the route Madras to Arkonam, (7) MDE 3545 to ply on the route Madras to Tindivanam pending issue of procedure under section 68-F (1) of the Motor Vehicles Act by the Government to the State Transport undertaking, (8) MDY 7274, MDL 1155 on the route Madras to Chellampattidai, (9) TNH 3635, TNJ 3635 to ply on the route Madras to Wandiwash, (10) MDR 5104 to ply on the route Madras to Purisai, (11) MDY 9681 ply on the route Kadambur to Thathirengarpet (in W.P. Nos. 3773, 3774, 3777, 3778, 3780, 3781, 3794, 3795, 3901, 3933, 3934, 3935, 3936, 3937, 3834 of 1974.)

K. K. Venugopal, for *M. Krishnappan*, *T. Chengalvaroyan* for *S. R. L. Narayanan*, *Miss. P. Vedavalli*, *S. Varadachari*, *A. R. Ramanathan*, *C. S. Prakasa Rao* and *Mrs. S. Radha Gopal*, for Petitioners.

G. Ramaswami, Government Pleader, assisted by *S. Ramalingam*, for 1st Respondent.

R. Balasubramanian, for 2nd Respondent.

The Court made the following

ORDER.—As the questions involved in all the writ petitions are the same, they are dealt with together. The facts in all the cases are substantially the same. Hence it is enough to set out the facts in the first of these cases, namely W.P. No. 3558 of 1974.

2. The petitioner in W.P. No. 3558 of 1974 is operating a stage carriage on the route Madras (Broadway) to Kancheepuram since the year 1952. A draft scheme of nationalisation was proposed by the Tamil Nadu State Transport

Department in regard to this route on 22nd April, 1968. The said draft scheme has been approved by the State of Tamil Nadu under section 68-D of the Motor Vehicles Act, 1939, hereinafter referred to as the Act, and published in the Tamil Nadu Gazette dated 2nd July, 1974. As a result of the publication, the said scheme has become an approved scheme under section 68-D (3) of the Act.

3. The petitioner had earlier impugned the validity of the proceedings initiated under Chapter IV-A of the Act by way of a writ petition in this Court as also in the Supreme Court but without success. The particulars of those proceedings are not, however, relevant for a decision in these writ petitions. During the pendency of those proceedings, as a result of the orders of the Court, the petitioner was plying his vehicle on the route under temporary permits as his pucca permit had expired by efflux of time and no renewal has been ordered. The petitioner's current temporary permit is valid upto the period of 30th November, 1974.

4. In this writ petition the petitioner has not challenged the validity of the approved scheme but he has questioned only the manner of implementation of the said approved scheme. According to the petitioner he is entitled to continue to ply on the route in question on temporary permits until the Pallavan Transport Corporation, Limited, the second respondent herein, is issued a pucca permit under section 68-F (1) of the Act by the concerned Regional Transport Authority, in accordance with law. But the Regional Transport Authority, the third respondent, had issued certain memos on 1st October, 1974 and on subsequent dates to all the operators cancelling or withdrawing the temporary permits already issued to them, directing them to stop their vehicles forthwith and stating that if the vehicles are found to be plying on the routes thereafter, the same will be impounded. The petitioner, has, therefore, sought a writ of *mandamus* from this Court to forbear the respondents from interfering with the petitioner's plying of his buses on the route in question till pucca permits are issued under section 68-F (1) of the Act to the second respondent.

5. The petitioner raises the following contentions in support of his plea that he is entitled to continue to ply his vehicle on the route in question notwithstanding the approved scheme. (1). So long as there is no prescription of the manner in which any State Transport Undertaking has to apply for the stage carriage permit as contemplated in section 68-F (1) no permit could validly be issued to it by the State Transport Authority for implementation of the approved scheme.

(2) Till the approved scheme is validly implemented there cannot be any prohibition on the existing operators plying their vehicles on the route either on the basis of a pucca permit or on the basis of a temporary permit.

(3) Pucca permit has been applied for by the second repsondent in all these cases under section 68-F (1) to the Deputy Transport Commissioner (Nationalisation) who is not the Regional Transport Authority constituted under section 44 and that, therefore, all these applications are invalid.

6. Mr. K. K. Venugopal, learned counsel for some of the petitioners submits that the petitioner has got a fundamental right to carry on his business of running a public carrier on the highways under Article 19 (1) (*g*) of the Constitution, that such a right cannot be denied to him by the State on the ground that it owns the highways though it is entitled to impose limitations and restrictions in the interest of the general public or exclude him wholly or in part from exercising such right, by carrying on the said business either by itself or through Corporation owned or controlled by it, under Article 19 (6) introduced by the Constitution Amendment Act of 1951 and that this proposition is well-established by the decision of the Supreme Court in *Sahir Ahmed* v. *State of U.P.*[1], According to him the petitioner's right to ply his vehicles on the route in question can be taken away either in whole or

1. A.I.R. 1954 S.C. 707.

in part only when the second respondent, which is a Corporation owned by the State, is in a position to ply its vehicles on the route in implementation of the approved scheme. For appreciating the said contention it is necessary to notice briefly the relative provisions in Chapter IV-A of the Motor Vehicles Act, 1939 as amended by Madras Act XVIII of 1968.

7. Section 68-A (*b*) defines "State Transport undertaking" as any undertaking providing road transport service where such undertaking is carried on by the Central Government or the State Government or any Road Transport Corporation established under section 3 of the Road Transport Corporations Act, 1950. Section 68-B gives an overriding effect to the provisions of Chapter IV-A or any other law for the time being in force. Section 68-C empowers a State Transport undertaking, hereinafter referred to as the undertaking, to prepare and publish its scheme of road transport service in relation to any area or route or portion thereof if it is of the opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service it is necessary in the public interest to run and operate the road transport services. Section 68-CC (1) enables the undertaking to apply, after the publication of the scheme under section 68-C, for a temporary permit in respect of the area or route or portion thereof specified in the said scheme and the State Transport Authority to issue a temporary permit on such application, notwithstanding anything to the contrary contained in Chapter IV or Chapter IV-A. Sub-section (2) of section 68-CC says that a temporary permit issued under sub-section (1) shall be effective till the grant of pucca permit to the undertaking under sub-section (1) of section 68-F, provided that if the scheme is not approved under section 68-D (2), a temporary permit shall be effective till the expiration of a period of one week from the date of refusal to approve the scheme. Under section 68-D (1), the existing operators along or near the area or route proposed to be covered by the scheme and any association representing persons interested in the provision of road transport facilities recognised by the State Government and any local authority or police authority within whose jurisdiction any part or area or route lies can file their objections to the scheme within 30 days from the date of its publication in the official gazette. Sub-section (2) of that section gives an opportunity to the objectors to be heard in person if they so desire before the scheme is approved or modified by the State Government. Under sub-section (3) the scheme as approved or modified under sub-section (2) shall be published in the official gazette by the State Government and on such publication it becomes final and is called an appoved scheme and the area or route to which it relates is to be called "notified area" or "notified route". Section 68-E provides for the cancellation or modification of the scheme by the undertaking.

8. Sub-section (1) of section 68-F is as follows:—

> "Where, in pursuance of an approved scheme, any State Transport undertaking applies (in such manner as may be prescribed by the State Government in this behalf) for a stage carriage permit or a public carrier's permit or a contract carriage permit in respect of a notified area or notified route (the State Transport Authority in any case where the said area or route lies in more than one region and the Regional Transport Authority in any other case) shall issue such permit to the State Transport undertaking, notwithstanding anything to the contrary contained in Chapter IV."

The expression "in such manner as may be prescribed by the State Government in this behalf" occurring in this sub-section was substituted for the expression "in the manner specified in Chapter IV" with effect from 1st October, 1970 by section 41 of Central Act LXVI of 1969. The words "State Transport Authority, in any case where the said area or route lies in more than one region and the Regional Transport Authority in any other case" have been substituted for the words "Regional Transport Authority" with effect from 2nd March, 1970 by the same amending Act. Thus as per the amended provision set out

above, in pursuance of an approved scheme, any undertaking can apply "in such manner as may be prescribed by the State Government." for a stage carriage permit in respect of a notified area or notified route and the State Transport Authority in any case where the said area or route lies in more than region and the Regional Transport Authority in any other case shall issue such permit notwithstanding anything to the contrary contained in Chapter IV. The word "prescribed" has been defined under section 2 (21) as prescribed by rules made under this Act. So the sub-section contemplates the filing of an application by the undertaking for a permit in the manner prescribed by the rules by the State Government under section 68-I. Sub-section (I-A) of section 68-F says that after the publication of a scheme under section 68-C the undertaking may apply for a temporary permit in respect of any notified area or route or portion thereof for the period intervening between the date of the publication of the draft scheme and the date of publication of the approved or modified scheme, and where such application is made the State Transport Authority or the Regional Transport Authority as the case may be, hereinafter called compendiously the Transport Authority, shall issue such a temporary permit if it is satisfied that it is necessary to increase in the public interest the number of vehicles operating in such area or route or portion thereof. Sub-section (1-B) provides that a temporary permit issued under section (1-A) shall be effective (*i*) if the scheme is published under sub-section (3) of section 68-D until the grant of the permit to the undertaking under sub-section (1), or (*ii*) if the scheme is not published under sub-section (3) of section 68-D, until the expiration of the one week from the date on which the order under sub-section (2) of section 68-D is made. Sub-section (1-C) enables the Transport Authority, to grant, subject to such conditions as it may think fit to impose, temporary permit to any person in respect of the area or route or portion thereof specified in the scheme if no application for a temporary permit has been made under sub-section (1-A) and provides that a permit so granted shall cease to be effective on the issue of a pucca permit to the undertaking in respect of that area or route or portion thereof. Sub-section (1-D) gives a mandate that "save as otherwise provided in sub-section (1-A) or sub-section (1-C)", no permit shall be granted or renewed during the period intervening between the date of publication, under section 68-C, of any scheme and the date of publication of the approved or modified sheme, in favour of any person or any class of road transport service in relation to an area or route or portion thereof covered by such scheme". Sub-section (2) of section 68-F enables the Transport Authority, to refuse to entertain any application for grant or renewal of any permit, or reject any such application as may be pending, or cancel any existing permit or modify the terms thereof by rendering the same in effective, or reduce the number of vehicles authorised to be used under the permit, or curtail the area or route covered by the permit in so far as such permit relates to the notified area or notified route for the purpose of giving effect to the approved scheme. Section 68-FF imposes a restriction on the Transport Authority, not to grant any permit in respect of any notified area or notified route except in accordance with the provisions of the approved scheme.

9. Briefly stated, under the provisions above referred to, a statutory authority called State Transport undertaking is authorised to initiate a scheme of nationalisation of a bus transport, the aggrieved parties are given opportunity to file objections thereto, and the State Government is empowered, after hearing those objections, to approve or modify the scheme as the case may be. After the publication of the draft scheme under section 68-C the undertaking can apply for and obtain a temporary permit to run its vehicles on the area or route covered by the scheme until grant of a pucca permit under section 68-F (1), and once the scheme is published no private operator can get a pucca permit except in accordance with the said scheme.

10. It is not in dispute that the second respondent as a State Transport undertaking is running its vehicles on some of

the notified routes, on temporary permits issued under section 68-F (1-A) pending the grant of pucca permit under sections 68-F (1), and in respect of other routes on permits issued under section 68-F (1). The validity of the approved schemes covering the above routes has not been challenged now. Therefore, we have to proceed on the basis that there are valid approved schemes covering the routes in question and the second respondent is also plying its vehicles in all the notified routes either on temporary permits issued under section 68-F (1-A) or on pucca permits issued under section 68-F (1). It is in the light of these facts the contentions of the writ petitioners have to be considered.

11. According to the learned counsel for the petitioners the power to issue permits to an undertaking under section 68-F (1) can be exercised only when the State Government prescribes the manner of application for a permit by the rules and as the State Government has not framed the rules in this behalf, the undertaking cannot validly apply for a permit in implementation of the approved scheme and that so long as the scheme is not implemented the Transport Authority cannot refuse to renew the petitioners' permits or refuse to grant temporary permits to them as the proviso to section 68-FF specifically enables the grant of temporary permits to others in respect of the notified area or notified route if no application for a permit has been made by the undertaking in respect of that area or route. It is said that so long as there is no possibility, in the absence of rules, of any valid grant of permit as contemplated by section 68-F (1) in respect of any notified route in pursuance of an approved scheme, the petitioners cannot be prevented from operating their vehicles on that route. The question, therefore, is whether the second respondent's applications for pucca permits before the Transport Authority are valid or not. If the applications are not valid, then the proviso to section 68-FF will come into play, in which case it is for the Transport Authority to consider the question of grant of temporary permits to any person in respect of the notified route if there is need. After the approved scheme take effect, admittedly the Transport Authority cannot grant or renew any permit in respect of any notified route except in accordance with the said scheme in view of the restriction contained in section 68-FF and as such the petitioners cannot seek renewal of their permits after the approved scheme has come into existence except in accordance with that scheme. Whether their applications for temporary permits could be considered under the proviso to section 68-FF depends on the question as to whether or not the second respondent has made an application for a permit in respect of the routes in question under section 68-F (1).

12. The learned counsel for the petitioners contend that in the absence of the rules prescribing the manner of application as contemplated by section 68-F (1) there cannot be any valid application for a permit. Reference is also made to the decision in *Srinivasa* v. *State of Mysore*[1], where the Supreme Court, while considering the necessity for an application for permit under section 68-F (1) before its amendment by Central Act LVI of 1969, held that a permit issued to a State Transport undertaking without following the procedure contemplated by the provisions of Chapter IV is invalid as the procedure is mandatory. A decision of a Division Bench of this Court in *Royappa Gounder* v. *Commercial Tax Officer*[2], has also been referred to. In that case the power of reassessment under the Madras Entertainments Tax Act, 1939 introduced by the amending Act of 1966 was subject to the condition of its exercise within the period prescribed by the rules. But no rules had in fact been framed fixing the period before which the power to reassessment is to be exercised. It was held:

> "Where power is given by a legislative provision in terms that it can be exercised only within the time to be prescribed, it clearly follows, in our opinion, that, unless the limits of time

1. 1960 S.C.J. 1092 : (1960) 2 S.C.R. 130: A.I.R. 1960 S.C. 350.

2. (1967) 2 M.L.J. 546 : A.I.R. 1968 Mad, 274.

are drawn, the power itself cannot be exercised. This is because the intention of the Legislature is that the power is not available for exercise at any time but only within the prescribed time. In the absence of prescription by rules, therefore, the intention of the Legislature is not fully effectuated, and the power is incomplete and cannot be exercised."

Thus it is the contention of the learned counsel for the petitioners that the rules as contemplated by section 68-F (1) are absolutely necessary for exercise of the power to grant a permit.

13. It is conceded by the learned Government Pleader that the rules contemplated by that section prescribing the manner of application for a permit by the undertaking have not been framed. He, however, contends that even in the absence of the rules applications for permit could be made and permits obtained by the undertaking under the said section, especially when there cannot be any rival applicant for permit in view of the existence of the approved scheme. He points out that after the coming into existence of the approved scheme in relation to a particular route the Transport Authority has no option except to issue the permit provided an application has been made by the undertaking, and that even without prescribing the manner of application, an application can be made giving the necessary details. He submits that the decisions above referred to are not quite relevant on the point, that the requirement as to the rules has to be considered in the light of the various provisions in Chapter IV-A that the rules contemplated in section 68-F (1) are only in relation to the prescription of the manner of the application and not with reference to the mode of exercise of that power to grant a permit, and that as the Transport Authority is under an obligation to issue a permit once an application has been made by the undertaking, the framing of the rules by the Government cannot be said to be obligatory. He refers to the decision in *Murugesan* v. *Collector of North Arcot*[1], as a case directly in point. In that case the scope of section 16 of the Madras Panchayats Act to divide the village or town into wards "in accordance with such scale as may be prescribed" came up. But no rules had been framed by the State Government in that regard. The Inspector, however, proceeded to divide a village into wards and directed the conduct of election for those wards as divided. The question arose as to whether such division of the village into wards in the absence of the rules fixing the scale contemplated by the section was valid. The Bench expressed the view that the framing of rules is not obligatory on the part of the Government, and that the section having imposed a duty on the Inspector to divide the village into wards for the conduct of the elections that duty cannot be postponed until after the framing of the rules by the Govrnment as and when they chose. The Bench pointed out that the enabling power given to Government to make rules under section 16 was not a condition precedent to the exercise of the jurisdiction conferred on the Inspector. This decision supports the contention of the learned Government Pleader that the power to grant a permit to the applicant which is necessarily coupled with a duty cannot be kept in abeyance till the rules are framed and that the existence of the rules providing the manner of application, in the face of an approved scheme, is not a condition precedent for exercise of the power to grant a permit under section 68-F (1) and that in the absence of the rules the Transport Authority can have its own procedure, relating to the manner of application.

14. The learned Government Pleader also refers to the decision of the Supreme Court in *Dhani Devi* v. *S. B. Sharma*[1], wherein their Lordships pointed out that in the absence of any statutory rule the Regional Transport Authority may devise any reasonable procedure for dealing with a particular situation and that where the statute does not require any particular procedure to be followed by any administrative agency, it may adopt any reasonable procedure to carry out

1. (1966) 2 M.L.J. 290.

1. (1969) 2 S.C.R. 507 : (1970) 2 S.C.J. 157 : A.I.R. 1970 S.C. 759.

its functions. Relying on the said decision he states that inasmuch as there are no rules framed by the State Government the permit-granting authority can follow its own procedure in the receipt of application for permit under section 68-F (1).

15. *Deep Narain* v. *State of Bihar*[1], was a case where a draft scheme under section 68 (*c*) and the approved scheme under section 68-D were challenged as invalid on the ground that no rules prescribing the form in which any draft scheme or approved scheme is to be published as contemplated in section 68-I. existed. It was held in that case that section 68-I does not impose a duty upon the State Government to make rules and that the failure on the part of the State Government to make the rules cannot affect the legal validity either of the draft scheme or of the approved scheme and that it was not necessary before framing or approving a scheme that the rules must be framed under section 68-I of the Act. In *Dargah Committee, Ajmer* v. *State of Rajasthan*[2], the validity of section 222 (1) of the Merwara Municipalities Regulation, 1925 was challenged on the ground that unless rules are framed and the form of notice is prescribed as required by section 234 of the Act no demand can be said to have been made in the manner prescribed by rules and so the proceedings under section 234 were invalid. The Supreme Court while rejecting that contention expressed the view that if the rules are not prescribed as required by section 234, then all that can be said is that there is no form prescribed for issuing a demand notice, but that it does not mean that the statutory power conferred under section 222 (1) to make a demand is unenforceable and an amount which is claimable by virtue of section 222 (1) does not cease to be claimable just because rules have not been framed prescribing the form for making the said demand. In *Rex* v. *Lincolnshire Appeal Tribunal, Stubbins, Ex parte*[3], the question arose as to whether a right of appeal given by the statute can be said to have been lost if notice of appeal had not been given in the prescribed form. The Court held that the appellate jurisdiction could be exercised in the absence of a notice of appeal in the prescribed form, that it is not a condition precedent to the exercise of the appellate jurisdiction and that the requirement as to the form of notice of appeal is only directory and not mandatory or imperative.

16. On a due consideration of the matter in the light of the above decisions, I am of the view that the failure of the Government to make rules prescribing the manner of application for a permit by the Transport undertaking will not take away the power of the Transport authority to issue a permit or the right of the Transport undertaking to get a permit under section 68-F (1). It is true, where an Act creates an obligation and enforces its performance in a specified manner, then the general rule is that performance cannot be enforced in any other manner. But section 68-F (1) which creates an obligation on the Transport Authority to grant a permit on an application by an undertaking does not say that the performance of that obligation is subject to any condition. Even if the statute has prescribed the manner of application, it can only be taken as directory and not imperative in the context of the approved scheme. Where the statute has left the manner of application to the rule-making authority to prescribe and the rule-making authority has not chosen to prescribe the manner of application, can it be said that the statutory obligation to grant a permit by the Transport Authority and the statutory right of the undertaking to get a permit are taken away? The right to require a permit by the undertaking and the power of the Transport Authority to grant a permit which is coupled with a duty cannot be taken away by the inaction of the Government to frame rules.

17. Besides, once an approved scheme comes into existence the issue of a permit under section 68-F (1) to the undertaking is a mere legal formality, as there cannot be any opposition by any objector and,

1. A.I.R. 1960 Pat. 575.
2. (1962) 2 S.C.R. 265 : (1962) M.L.J. (Crl.) 321 : (1962) 1 S.C.J. 583 : A.I.R. 1962 S.C. 574.
3. (1917) 1 K.B. 1.

therefore, the absence of a prescription as to the manner of application cannot be said to be of much consequence It has been held by the Supreme Court in *Abdul Gafoor* v. *State of Mysore*[1], that the Transport Authority acts wholly in a ministerial capacity while dealing with an application of the undertaking under section 68-F (1). Once the provisions of Chapter IV have been excluded in the case of applications for permit made by an undertaking in pursuance of an approved scheme, the issue of permit in favour of that Transport undertaking is automatic and does not depend on the manner of application. The Transport Authority had no option but to issue the permit to the undertaking. If the manner of application has been prescribed by the State Government the undertaking may follow that manner. In the absence of a prescription of the manner by the rules, the application for permit can be in any manner acceptable to the permit-issuing authority. I am, therefore, of the view that the undertaking can apply for a permit under section 68-F even in the absence of the rules prescribing the manner of application, and the applications filed by it for permits cannot be said to be invalid or incompetent.

18. According to the learned Government Pleader, even assuming that the permit cannot be validly granted to the undertaking under section 68-F in the absence of the rules, the petitioners who have no right to apply for and get a permit to ply their vehicles on the notified routes in view of section 68-FF, cannot question the second respondent's right to run its vehicles on the notified routes even without a permit, and reliance is placed on the decisions of the Supreme Court in *Kalyan Singh* v. *State of U.P.*[2] and *Sobhrai Odharmal* v. *State of Rajasthan*[3]. In *Kalyan Singh* v. *State of U.P.*[2], there was an approved scheme in relation to a particular route. As a result of the scheme a notification was issued under section 68-F (2) of the Motor Vehicles Act cancelling the renewed permit issued in favour of an existing operator. The said operator challenged the validity of the scheme and the cancellation of his licence. The Supreme Court upheld the validity of the scheme and also justified the cancellation of the licence. It held that the scheme having been validly promulgated and having become final under section 68-D (3) it had the effect of extinguishing all rights of the existing operators to ply their stage carriages under their permits and the cancellation of the permits of the operator was purely consequential on the scheme, and that once the right of an operator to ply his vehicles was validly extinguished, he could not question the right of the State Transport Authority to ply their stage carriages with or without permits in pursuance of the approved scheme. *Sodharai Odharmal* v. *State of Rajasthan*[1], was also a similar case. There on an approval of a scheme under section 68-D (3), the Regional Transport Authority ordered the undertaking to operate on the notified route and cancelled the permits of the private operators. The undertaking commenced operating its buses on the route even without obtaining permits. The private operators whose permits had been cancelled moved the High Court for a writ to quash the scheme but without success. There-after they took the matter to the Supreme Court and one of them filed a petition under Article 32 of the Constitution alleging that his right to carry on business had been infringed by the scheme and the cancellation of the permit. The Supreme Court held that once a scheme was legally made and published, the permits of the private operators on the route could be validly cancelled, that they would not, thereafter, be entitled to challenge the plying of the vehicles by the undertaking with or without permit and that since the permits of the private operators were lawfully cancelled, they had no fundamental right which could be infringed. In this case the earlier

1. (1962) 1 S.C.R. 909: (1963) 1 S.C.J. 440: A.I.R. 1961 S.C. 1556.
2. (1963) 1 S.C.J. 50: A.I.R. 1962 S.C. 1184.
3. (1963) 2 S.C.J. 188 : A.I.R. 1963 S.C. 640.

1. (1963) 2 S.C.J. 188 : A.I.R. 1963 S.C 640.

decision in *Kalyan Singh* v. *State of U.P.*[1], had been referred to and followed. The principle of the above decisions is applicable to the case of the petitioners.

19. Once the schemes are approved and published as contemplated under section 68-D (3) and those schemes have not been challenged, the petitioners who have no valid permits under section 42 (1) of the Act have no fundamental rights to be infringed by the second respondent plying its buses under the permits issued to it by the Transport Authority even without the aid of the requisite rules prescribing the manner of application for a permit. Section 68-FF is absolute in its terms and it states that once a scheme has been published under section 68-D (3) in respect of any notified route, the Transport Authority shall not grant any permit except in accordance with the provisions of the scheme. Under the approved scheme the petitioners are not entitled to ply their vehicles in respect of the routes covered by the scheme and, therefore, they cannot apply and obtain permits on those routes. Therefore, whether the second respondent runs its vehicles on the notified route on the basis of a valid permit or not, the petitioners cannot challenge the plying of vehicles by the second respondent on the notified routes, for in any event they are not entitled to any permit on those routes.

20. It is also not possible to accept the petitioners second contention that the petitioners are entitled to run their vehicles on the notified routes till pucca permits are validly granted to the second respondent under section 68-F (1). Under section 68-F (1) a statutory duty is imposed upon the Transport Authority to issue permits to the undertaking, if an application is made in that behalf pursuant to an approved scheme. Hence the issue of a permit under that section is a mere formality. Section 68-FF prohibits the grant of any permit except in accordance with the approved scheme. Therefore, whether the second respondent had validly applied for a permit under section 68-FF (1) or not, so far as the petitioners are concerned, they are not entitled to get a permit after the approved scheme has come into existence. Under section 68-F (2), for the purpose of giving effect to the approved scheme in respect of a notified route the Transport Authority may refuse to renew a permit, cancel any existing permit or modify its terms so as to render it ineffective beyond a specified date. Exercising the power of cancellation of a permit or of making it ineffective beyond a specified date is not dependent upon the grant of any permit to the State Transport undertaking under sub-section (1) of section 68-F. Dealing with the conditions under which the power under section 68-F (2) may be exercised the Supreme Court in *Samarth Transport Co. (P.) Ltd.* v. *The Regional Transport Authority, Nagpur*[1], has observed:

> "This power does not depend upon the presentation of an application by the State Transport undertaking for a permit. This power is exercisable when it is brought to the notice of the authority that there is an approved scheme, and to give effect to it, application for renewal cannot be entertained."

The above observation of the Supreme Court sufficiently answers the contention of the petitioners that they are entitled to continue to operate on the basis of at least temporary permits till there is a valid presentation of an application by the undertaking for a permit under section 68-F (1).

21. As regards the third contention, I consider that the said question does not arise in these cases where the relief sought for is only a writ of *mandamus* to forbear the respondents from interfering with the petitioners' plying of their buses on specified routes. The validity of the permits, if any issued, to the second respondent has not been challenged here. Even otherwise in view of the decisions of the Supreme Court referred to above, the petitioners who have no right to ply

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1. (1963) 1 S.C.J. 50 : A.I.R. 1962 S.C. 1183.

1. (1961) 1 S.C.R. 631 : (1961) 1 S.C.J. 368 : A.I.R. 1961 S.C. 93.

their vehicles on the notified routes after the scheme is approved cannot challenge the validity of the permits issued in favour of the State Transport Undertaking.

22. Therefore all the contentions put forward by the petitioners fail and consequently all the writ petitions are dismissed. The rule *nisi* in each case is discharged, and there will be no order as to costs in contested matters.

S.J. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, J.*

Athirubam .. *Petitioner**

v.

Lahia Bi Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 37—*Execution of money decree—Judgment-debtor getting a total salary of Rs.* 350—*Various deductions made from salary—Executing Court not accepting explanation and ordering arrest—Order not correct—Executing Court directed to give further opportunity to judgment-debtor—Case calls for exercise of equitable jurisdiction of High Court.*

In execution of a money decree the petitioner was arrested. The petitioner was drawing a total salary of Rs. 350. The petitioner pleaded that deductions were made towards provident fund and certain other attachments effected pursuant to other money decrees against him. According to the learned Subordinate Judge, there was no proof of such deductions and he ordered arrest. The petitioner filed a revision.

Held, In the year of grace 1973, a salary of Rs. 350 even to a lower middle class family could not be said to be an attractive one which could prompt a civil Court to issue a warrant of arrest in execution of a money decree if he failed to pay the same. This is a case in which the equitable jurisdiction of the High Court should be exercised and the order of arrest set aside, giving a direction to the petitioner to pay the decree amount in instalments. [*Para.* 1.]

Case referred to :—

Madhavan Nambiar v. *Chaldean Syrian Bank Ltd.*, (1955) 2 M.L.J. 121 : A.I.R. 1955 Mad. 409.

Petition under section 115 of the Act V of 1908 praying the High Court to revise the order of the Addl. District Judge, Salem dated 29th October, 1974 and made in C.M.A. No. 56 of 1974 (E.P. No. 201 of 1973 in O.S. No. 404 of 1972 Addl. Sub-Court, Salem).

T. K. Rajagopalan, for Petitioner.

S. I. Samiullah, for Respondent.

The Court made the following

ORDER.—I do not think that the learned Subordinate Judge was right in having directed the arrest of the Government servant who was admittedly receiving a total salary of Rs. 350 per month. The petitioner's case is that certain deductions are made towards his Provident Fund loan, and certain other attachments are being effected pursuant to other money decrees against him. All these factors were noticed by the learned Judge. But according to him, there was no proof of such deductions towards loan or deductions towards salary attachment. He ought to have given a further opportunity to the petitioner to produce such evidence. He ought not to have discountenanced them and held the view that there is no satisfactory evidence to establish the same. In any event, in the year of grace 1973 a salary of Rs. 350 even to a lower middle class family cannot be said to be an attractive one which could prompt a civil Court to issue a warrant of arrest in execution of a money decree if he fails to pay the same. It was in such circumstances, a division Bench of this Court in *Madhavan Nambiar* v. *Chaldean Syrian Bank Ltd.*[1] set down a rule of equity and good conscience. Mack, J., Speaking for the Bench observed as follows:—

*C.R.P. No. 3834 of 1974. *29th August,* 1975.

1. (1955) 2 M.L.J. 121 : A.I.R. 1955 Mad. 409.

"The fixation of instalments after an enquiry into the means and the ability of the judgment debtor to pay in many cases is much fairer to the judgment-debtor who, whilst not being in a position to discharge the decree in full, can certainly pay something towards its discharge. The fixation of instalments helps to bridge the wide gulf between the dismissal of an execution petition for arrest on a decree-holder failing strictly to discharge the the onus resting on him under the proviso to section 51 and the commitment to prison of a judgment-debtor who while in a position to pay something simply cannot discharge the decree in full as he has no immediate means to do it."

While respectfully adopting the observations, I am of the view that this is a similar case in which the equitable jurisdiction of this Court should be exercised and the order of arrest *set aside*, giving a direction to the petitioner to pay the decree amount in instalments. The respondent has filed the execution petition for recovery of a sum of Rs. 6,670.65 due towards a decree. Taking all the circumstances into consideration, I direct that the petitioner should pay a sum of Rs. 100 per month towards the decree and in case of default of any one instalment, the respondent may take such steps as he may be inclined to realise the unpaid portion of the decree amount. The Civil Revision Petition is allowed. There will be no order as to costs.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. Veeraswami, CJ. and S. Natarajan, J.*

The State of Madras represented by the Chief Secretary to the Government of Madras, Fort St. George, Madras-9 and others .. *Appellants**

v.

The Bombay Burmah Trading Corporation Ltd., Mudis, Coimbatore District, represented by its group manager, Dr. K. T. Mathew .. *Respondents.*

Constitution of India (1950), *Article* 226—*Lease of land by Government—Cultivation of plantation products—Clause that grantee shall not export or sell trees which grow on land—Grantee planting grevilla trees for purpose of shade—Permission sought to cut the grevilla trees so planted—Collector demanding seigniorage fees—Whether correct.*

The respondent was granted a lease of a large extent of land by the Government for cultivation of plantation products. The clauses in the grant *inter alia* included a condition that the grantee shall not export or sell the trees or timber which grow on the land. The respondent planted grevilla trees for purposes of shade for tea plants and sought the permission of the Collector for cutting the trees for sale. The Collector demanded seigniorage fees which was questioned in a writ proceeding. The demand was quashed on the ground that the trees were not of spontaneous growth but were planted by the assignee. On appeal by the Government on the ground that cutting of trees for commercial purpose was not within the scope of the grant,

Held, when anything different from the enumerated kind of plantation is sought to be planted previous permission of the Government is required. Reading all the clauses together, commercialising on trees or timber, which grow on the land and which the assignee seeks to cut and carry away for commer-

*W.A. No. 219 of 1974. *24th September*, 1975.

cial purposes, is not within the scope of the grant. [*Para.* 3.]

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ramaprasada Rao, dated 14th August, 1972 and made in the Exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 3063 of 1970 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for records relating to K. Dis. 53998/69 dated 2nd April, 1970 on the file of the 3rd respondent therein and to quash that portion of the said order directing payment of Seigniorage fees.

The Government Pleader, for Appellants.

King and Patridge, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The appeal comes from an order of Ramaprasada Rao, J., allowing a petition to quash a demand made by the Collector of Coimbotore on 2nd April, 1970 on the respondent to pay seigniorage fees for transport of grevilla trees from the Kottur Village on the Anamalais, Coimbatore District. An extent of 5851 acres of land in Block Nos. 30, 31, 43 and 45 in that village was assigned to the respondent, the Bombay Burmah Trading Corporation Limited, by an order of Government dated 10th May, 1929 for cultivation of plantation products. The assignment was subject to certain conditions specified. One of the conditions was that the land shall be used only for the cultivation of coffee, tea, cocoa, cinchona, cardamoms pepper, rubber or any other product that the Government may by special orders recognise as a plantation product, or for the erection of any buildings or constructing any roads thereon, which may be necessary for effecting and supervising such cultivation and preparing the produce for markets. It was also required by another condition that, where the forest was cleared, the assignee should plant plantation crops within such reasonable time as might be fixed by the Collector of Coimbatore in each case. The Government reserved to themselves their right to a share in mines and quarries adjacent to the land and so also the right of ingress or egress for the purpose of working the mines. We have then a condition that the grantee shall not alienate the land without the sanction of the Government to a person other than a British subject or the subject of an Indian State. Then comes the following condition :

> "The grantee shall not export or sell the trees or timber which grow on the land."

There are other conditions too, but it is not necessary to refer to them for purposes of this appeal.

2. Grevilla trees were planted by the assignee for the purpose, as it is stated, of giving shade to the tea plantation. The assignee sought the permission of the Collector to cut and remove 20,000 grevilla trees measuring 10,00,000 cubic feet out of the trees so planted in the developed area. The seigniorage fees demanded by the Collector as a condition for the permission asked for amounted to Rs. 80,000. The intercession of the Board of Revenue was solicited by the assignee. It is said:

> "The Board considers that G.O. Ms. No. 948, Revenue, dated 10th May, 1928 merely permitted the grantee to grow plantation crops and that condition No. (9) of B. P. Press, 62, Revenue, dated 30th June, 1928 was imposed, as making of money through the sale o the trees was not contemplated."

So the Board issued instructions to the Collector to collect the seigniorage fees as the trees were sought to be cut and cleared for commercial purposes. This demand was quashed by Ramaprasada Rao, J.

3. The ratio of the order of the learned Judge entirely was based on the fact that the trees in question were not spontaneous growth, but planted by the assignee, which in the opinion of the learned Judge, made a difference. In such a case, he would hold that no seigniorage fees could be levied. We are unable to concur with this view of his on a construction of the terms of the assignment, particularly clause 9 we have referred to. When a question of construction arises, not only is it tessential that the clause sought to be

interpreted should be read and understood, having regard to the express language used, but also the process must involve, in deducing the proper meaning, a reading of the entire grant. The purpose of the grant was to assign land for cultivation of coffee, tea, cocoa, cinchona pepper, rubber or any other product that the Government may be special orders recognise as a plantation product. It is clear therefore that, when anything different from the enumerated kinds of plantation is sought to be planted, previous permission of the Government is required. It is no good saying that the trees in question were planted for the purpose of giving shade to the tea plantation. Nobody would deny that such trees were required to be planted for the purpose of protecting the tea plantation. But on that ground we cannot read into the condition of the grant that cultivation of coffee, tea, etc. would also include plantation of shade trees, because the plantation of such trees can by no stretch of imagination be brought under the word "cultivation". We are not told that any such permission of the Government for planting such trees was obtained. Clause 7 reserves to the Government their right to a share in mines and quarries adjacent to the land. The implication of this clause is that what is part of the land had not been assigned. The next clause 8 makes it further clear that alienation of land without the sanction of the Government to a person other than a British subject or the subject of an Indian State is inhibited and a land normally carries with it trees standing on the land, irrespective of how they grow. The sense underlying this clause as also the purpose of the grant, namely, that the assignment was only to enable the grantee to cultivate plantations, should be borne in mind before approaching clause 9, which is so clear that the inhibition there extends to all trees or timber "which grow on the land". It is said that the word 'grow' being intransitive, it would exclude planted trees. We are unable to agree. 'Grow' is common to both spontaneous as well as planted trees. Undeniably both grow on land. Reading all these clauses together, we are of opinion that commercialising on trees or timber, which grow on the land and which the assignee seeks to cut and carry away for commercial purposes, is not within the scope of the grant. On that view, we allow the appeal. No costs.

S. J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

Chellappa Sebastian and another .. *Petitioners**

v.

R. C. Diocese, Madurai through its Procurator General Rev. Fr. S. Jesudansan and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3), (b)—*Church premises—Petition for eviction under section* 10 (3) (b)—*Eviction ordered—Appeal—Government order exempting the institution from the provisions of the Act—Appeal dismissed—Tenants' contention that in view of the G.O. the lower Court had no jurisdiction—Contention rejected—G.O. cannot have retrospective effect.*

A church filed an eviction petition against two of its tenants under section 10 (3) (*b*) of Act XVIII of 1960. The landlord required the premises to have the buildings before the church, demolished and to use the space opposite the church to put up a gate and also to use the open space for congregation. The trial Court as well as the appellate Court ordered eviction. In revisions preferred by them, the tenants contended that the petition should have been under section 14 (1) (*b*) and further, in view of the fact that when the matter was before the lower appellate Court, the Government had passed a G.O. exempting religious institutions from the Act XVIII of 1960, the Court below had no jurisdiction to pass the eviction order.

Held,

The mere putting up of a gate for the purposes of convenient ingress and egress

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*C.R.Ps. No. 1743 and 1744 of 1975.

2nd December, 1975.

to the renovated church, could not be construed as putting up a new building in the place of the building that was sought to be demolished. If that be so, section 10 (3) (*b*) would be applicable to the facts of the case and not section 14 (1) (*b*) as alleged by the tenants. [*Para.* 8.]

The Government Order was only to facilitate the religious institutions to have quicker remedy for having buildings of its own for its own purpose. If that be so, there was no question of the orders passed or pending proceedings in the Rent Controller's Court under section 10 (3) (*b*) getting nullified. On the other hand, it was clear from the Government Order that there was no question of any retrospective effect given for the exemption granted by the said Government Order under section 29. Section 29 had not empowered the Government to pass any G.O., giving retrospective effect for such amendments. [*Paras.* 9 *and* 10.]

As far as the facts and law are concerned, the respondents-landlords were entitled to have the buildings in question for their own purpose under section 10 (3) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. [*Para.* 13.]

Cases referred to:

G. Ambiga Ammal v. *Selvaraja Mudaliar,* (1975) 2 M.L.J. 51; *Income-tax Officer, Alleppey* v. *M. C. Ponnoose,* (1970) 1 I.T.J. 190 : (1970) 1 S.C.J. 435 : (1970) 1 S.C.R. 678 : A.I.R. 1970 S.C. 385; *M/s. Killick Nixon Ltd.* v. *V. R. Narayana Rao,* (1974) 1 M.L.J. (S.N.) 16; *A. Viswanathan* v. *R. Subbarajulu,* (1974) T.L.N.J. 394.

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control Act, 1960 as amended by Act XXIII of 1973) praying the High Court to revise the Orders of the Court of the Principal Subordinate Judge (Appellate Authority), Madurai, dated 3rd April, 1975 and made in C.M.A. Nos. 117 of 1972 and 116 of 1972 (RCOP. No. 77 of 1971 and 75 of 1971 D.M.C., Madurai Town.).

M. Veluswami, S. Natarajan and *S. Abdul Samathu,* for Petitioners.

T. Martin, for Respondents.

The Court delivered the following

JUDGMENT.—These two civil revision petitions arise out of the order of eviction passed by the Courts below. The respondents who are the landlords filed eviction proceedings against two tenants numbered as R.C.O.P. No. 77 of 1971 and 75 of 1971 under section 10 (3) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. The main purpose for getting these buildings is to have the buildings demolished and to use the space which is opposite to the church to put up a gate and also to use the open space for congregation. Hence both the Courts below posed for decision the point as to whether the landlords requirement of the scheduled buildings in the occupation of the respective petitioners herein is for the purpose of the institution as contemplated under section 10 (3) (*b*) of the Act. Both the Courts came to the conclusion that the requirement is for the purposes mentioned in section 10 (3) (*b*) of the Act and that there is no question of invoking section 14 (1) (*b*) of the Act and as such the eviction prayed for by the landlords have to be granted.

2. Aggrieved by the decision of the Courts below, the respective tenants in the respective eviction proceedings have preferred the above said two Civil Revision Petitions.

3. Mr. Velusami, the learned counsel appearing for the petitioners-tenants in these revision petitions pointed out that there is specific provision in the Rent Control Act, to pray for demolition and reconstruction and as such, the learned counsel for the tenants submitted that the eviction petitions filed by the landlords under section 10 (3) (*b*) of the Act are not maintainable.

4. Learned counsel for the tenants also submitted that the requirement is not for their own purposes and as such section 10 (3) (*b*) cannot be invoked in the present case. It was further submitted by the counsel appearing for the petitioners-tenants herein that as per G.O. Ms. No. 1998, Home, dated 12th August, 1974 the Government in the exercise of the powers conferred upon it under section 29 of the Tamil Nadu Buildings

(Lease and Rent Control) Act, 1960, has exempted all the buildings owned by the Hindu, Christian and Muslim religious trusts and charitable institutions from all the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. If that be so, the learned counsel for the tenants submits that there is no question of ordering any eviction under the provisions of the Madras Act XVIII of 1960. It is clear from the facts that while the matter was pending before the lower appellate Court, the said G.O. has been passed. As such, Mr. Velusamy submits that the Court below had no jurisdiction to pass the eviction order as prayed for by the respondents herein.

5. Mr. Martin, learned counsel appearing for the landlords-respondents submitted that the requirement is for the purposes of the respondents-landlords herein and that there is no question of demolition and reconstruction as contemplated under section 14 (1) (*b*) of the Act since the respondents require the buildings for the purposes of demolishing the same and using the place for the purpose of congregation and also to erect a gate in order to have ingress and egress conveniently to the church which has been recently renovated. Learned counsel also submitted that the Government Order referred to above is not a substantive law and further there is no retrospective effect given in the said Government Order. As such, it is stated that the said exemption granted will not affect the pending proceedings.

6. I have been taken through the pleadings of the case and also certain decisions in order to substantiate the respective contentions placed by the respective counsel appearing in this case.

7. It is clear from section 10 (3) (*b*) that the respondents who are religious institutions can get any buildings of their own for the purposes of the institution by applying to the Controller. As far as the present case is concerned, the pleadings and also the evidence clearly make out that the requirement is only for the purposes of the respondents-institutions.

8. As regards the provision of law, it is clear that section 14 (1) (*b*) will not apply to the facts of the case since the prayer is not for demolition and reconstruction. The mere putting up of a gate for the purposes of convenient ingress and egress to the renovated church, cannot be construed as putting up a new building in the place of the building that is sought to be demolished. If that be so, section 10 (3) (*b*) will be applicable to the facts of this case and not section 14 (1) (*b*) as alleged by the counsel for the tenants herein.

9. As far as the G. O. Ms. No. 1998, Home, dated 12th August, 1974, is concerned, it contemplates only exemption for the religious institutions and other charitable trusts from coming under the purview of the Tamil Nadu Act XVIII of 1960. The intention of the Government Order is only to facilitate the religious institutions to have its buildings for its own purpose without recourse to the Rent Controller's Court. That does not meant-he right, the institution had before the passing of the Government Order has been nullified. The Government Order is only to facilitate the religious institutions to have quicker remedy for having the buildings of its own for its own purpose. If that be so, there is no question of the orders passed or pending proceedings in the Rent Controller's Court under section 10 (3) (*b*) getting nullified. On the other hand, it is clear from the Government Order that there is no question of any retrospective effect given for the exemption granted by the said Government Order under section 29 of the Tamil Nadu Act XVIII of 1960.

10. No doubt there is a decision rendered by Paul, J. in *G. Ambiga Ammal* v. *Selvaraja Mudaliar*[1] which states:

> "The effect of the notification passed by the Government of Tamil Nadu is that in respect of the premises in question, the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act would no longer apply and no order could be passed in respect of such buildings under any of the provisions of the act including section 25 which provides, for a revision to this Court. Therefore I find that this

1. (1975) 2 M.L.J. 51.

Court has no jurisdiction now to pass any order with regard to the premises in question and consequently this civil revision petition has to be dismissed and it is dismissed."

Mr. Velusamy citing this decision states that no order for eviction is sustainable whether it is passed before the passing of the Government Order or subsequent to the Government Order inasmuch as the matter is pending before this Court as regards the eviction prayed for by the respondents-landlords herein. It is clear from the decision rendered in *G. Ambiga Ammal* v. *Selvaraja Mudaliar*[1], that the effect of passing such Government Orders in respect of the pending proceedings and also proceedings ended to prior to such passing of the Government Order had not been discussed, in the light of various decisions that had been rendered on such subjects. Unless the Legislature makes it effect retrospectively, the amendment will not in any way affect the pending proceedings. As far as the present case is concerned, the Government Order enacted by the Government under the provisions of section 29 of the Act, cannot be construed as a substantive law, nor one which gives the retrospective effect to such provisions mentioned in the Government Order. To strenghten this view, Mr. T. Martin cited a case reported in *Income-tax Officer, Alleppey* v. *M. C. Ponnoose*[2]. In that decision the Supreme Court has observed :

"It is open to the Sovereign Legislature to enact laws which have retrospective operation. The Court will not ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the Legislature. The Parliament can delegate its Legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature, it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found, it has been held by the Courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or by-law which can operate with retrospective effect."

1. (1975) 2 M.L.J. 51.
2. (1970) 1 I.T.J. 190 : (1970) 1 S.C.J. 435: (1970) 1 S.C.R. 678 : A.I.R. 1970 S.C. 335.

The power conferred to pass such Government Orders is under section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The said section states :

"Notwithstanding anything contained in this Act, the Government may, subject to such conditions as they deem fit, by notification, exempt any building or class of buildings from all or any of the provisions of this Act."

Thus the section has not empowered the Government to pass any G.O. giving retrospective effect for such amendments. Applying the above said Supreme Court decision, the present G.O. cannot be considered as one giving retrospective effect. On the other hand, the pending proceedings are saved from the language of the present G.O. in view of the Supreme Court decision referred to above.

11. Mr. Martin has also cited *M/s. Killick Nixon Ltd.* v. *V. R. Narayana Rao*[1]. In this a bench of our High Court considering the amending Act XXIII of 1973 pertaining to the Tamil Nadu Buildings (Lease and Rent Control) Act, XVIII of 1960, held that the amending Act could not be taken to affect pending proceedings or the decisions rendered therein. The Bench further observed :

"If the Legislature intended the amendment to be retrospective so as to affect vested rights, it would have made a specific provision for abatement of the pending proceedings and the decisions rendered therein as was done when the Amending Act (II of 1962) was passed. It cannot be held that Act XXIII of 1973 either expressly or by necessary implication has provided for abate-

1. (1974) 1 M.L.J. (S.N.) 16.

ment of pending proceedings. In the absence of any such provision, it has to be taken that the amending Act was only prospective."

12. As far as the present case is concerned, there is no such amending Act by the Legislature excepting the Government passing a G.O. under the powers conferred upon them under section 29 of the Act. Hence, it is clear that the present G.O. can neither affect a decision rendered nor interfere with the pending proceedings inasmuch as there is nothing retrospective in the exemption granted to the religious institutions by the said Government Order. Mr. Velusamy cited a case reported in *K. Viswanathan* v. *R. Subbarajulu*[1], in support of the decisions rendered on the strength of certain amendments to the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, which were struck down by the Supreme Court as unconstitutional. I do not think that they will have any bearing on the facts of the present case and as such it is not applicable in the present context.

13. Taking all these aspects into consideration, this Court has jurisdiction to continue the proceedings which arose much earlier to the passing of the G.O. referred to above. As far as the facts and the law are concerned, the respondents/landlords are entitled to have the buildings in question for their own purpose under section 10 (3) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. There is absolutely no question of any illegality, impropriety or irregularity in the orders passed by the Courts below in favour of the respondents herein.

14. In these circumstances both these civil revision petitions are dismissed. No costs. Time to vacate *three months.*

S. J. *Petitions dismissed.*

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1. (1974) T.L.N.J. 394.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

M/s. Kabilan Transports Private Ltd. Udumalpet and another .. *Petitioners**

v.

M/s. Aswini Transports (P.) Ltd. .. *Respondent.*

Motor Vehicles Act (IV of 1939), section 47—Award of stage carriage permit—Preference of a three bus operator as against a four bus operator—Viable unit—Order not vitiated—Interest of public paramount consideration—Marks not sole criterion.

Where a Tribunal chooses to prefer a three bus operator as against a four bus operator for the purpose of viable unit, the order cannot be said to be vitiated. [*Para.* 20.]

In the matter of grant of permit "the interest of the public" is a paramount consideration and not the interest of the particular applicant. Even assuming that the revision petitioner would be entitled to 4 additional marks (as against the respondent) that cannot be the sole criterion on which the permit could be granted. [*Para.* 23.]

Cases referred to:

Rama Vilas Service v. *Raman and Raman Ltd.*, (1959) 2 M.L.J. 1 : (1959) M.L.J. (Crl.) 352 : 72 L.W. 474 : I.L.R. (1959) Mad. 641 : A.I.R. 1959 Mad. 492; *K. Balasubramania* v. *N. M. Sambandamoorthy* (1975) 1 S.C.C. 242 : A.I.R. 1975 S.C. 818; *C. S. S. Motor Service* v. *State of Madras*, I.L.R. (1953) Mad. 304 : 66 L.W. 85 : (1952) 2 M.L.J. 894 : A.I.R. 1953 Mad. 279.

Petitions under section 115 of Civil Procedure Code, read with section 64-B of the Motor Vehicles Act (introduced by section 10 of Madras Act XVI of 1971) praying the High Court to revise the Order of the Court of the Additional

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*C.R.P. Nos. 864 and 1427 of 1972. *12th December,* 1975.

State Transport Appellate Tribunal, Madras, dated 18th March, 1972 and made in (1) Appeal No. 730 of 1971 (2) Appeal No. 699 of etc. of 1971 respectively (Regional Transport Authority, Coimbatore, R. No. 27151/B-1/1970, dated 30th March, 1971.)

T. Chengalvarayan for *R. S. Ramanujam*, for Petitioner in C.R.P. No. 864 of 1972. and for the 2nd Respondent in C.R.P. No. 1427 of 1972 and *K. K. Venugopal* for *V. T. Gopalan* and *S. Radha Gopalan* for the Petitioner in C.R.P. No. 1427 of 1972.

G. Ramasuamy and *S. Parthasarathy*, for Respondent in C.R.P. No. 864 of 1972 and for the 1st Respondent in C.R.P. No. 1427 of 1972.

The Court made the following

ORDER.—These two revisions relate to the grant of Stage Carriage Permit to ply one additional bus on the route Udumalpet to Coimbatore. In response to the invitation of applications, 25 operators preferred their applications. The Regional Transport Authority, Coimbatore, granted the permit to Applicant No. 17, before it, *viz.*, Messrs. Kabilan Transports (Private) Limited, Udumalpet. This was by its proceedings, dated 18th March, 1971.

2. Five appeals were preferred against the said grant. The State Transport Appellate Tribunal, by a common order, dated 18th March, 1972 set aside the grant made in favour of Messrs. Kabilan Transports (Private) Limited. The grantee before the Regional Transport Authority (Kabilan Transports Private Limited) has preferred C.R.P. No. 864 of 1972 in so far as the permit granted in its favour was set aside.

3. Kannan Lorry Service (Private) Limited, Applicant No. 7 before the Regional Transport Authority (Appellant in Appeal No. 715 of 1972) has filed C.R.P. No 1427 of 1972, and this is how these revisions have come up before me for hearing. It may be useful to refer to a few more facts for a proper appreciation of the case.

4. Messrs. Kabilan Transport (Private) Limited was awarded 11.53 marks by the Regional Transport Authority, while Messrs. Kannan Lorry Service obtained 10 marks and Aswini Transports got 13.57 marks.

5. Mr. T. Chengalvarayan, learned counsel appearing for the petitioner in C.R.P. No. 864 of 1972 raises the following submissions :

6. Though the respondent obtained higher marks than the revision petitioner, the Regional Transport Authority took into consideration that the respondent was not operating the Pollachi-Kaliapuram route regularly and the temporary permit was given on this route to the other operator as substitute. It also took into consideration that the respondent was already covering the entire sector. It would, in effect, mean that the Regional Transport Authority did not want the respondent's predominant influence. However, the State Transport Appellate Tribunal took a light-hearted view of the matter saying that the non-performance of service has not ended in any punishment, and therefore, that should not be considered as a de-merit. Even otherwise, it related only to a negligible period of three days and, as such, no weight should be given to that. This approach is wrong and in support of the same, reliance is placed on the unreported judgment in W.P. No. 14 of 1968. In addition, as seen above, the respondent was covering the full sector in which case, it would have a predominant influence almost amounting to monopoly, which was a relevant consideration which was taken into account by the Regional Transport Authority, but it was not considered in its proper perspective by the Appellate Tribunal.

7. Even with regard to viable unit, it would prefer the respondent as a three bus operator, in order to encourage and build up a viable unit, which was waiting since May, 1970. In doing so, it ignored the stagnation suffered by the revision petitioner. It is the further submission of the learned counsel that after the award of marks, before making the actual grant, the criteria mentioned under section 47 of the Motor Vehicles Act (hereinafter referred to as the Act) should be borne in mind. But the Appellate Tribunal was purely guided by the higher marks and

thereby ignored altogether the conditions adumbrated under section 47 of the Act.

8. Mr. K. K. Venugopal, learned counsel for the revision petitioner in C.R.P. No. 1427 of 1972 strenuously urges that though his client secured only 10 marks, in fact, he would be entitled to 4 additional marks, as the owner of four permits. But, those marks were not awarded by the Regional Transport Authority on the ground that the permit-holders, who have surrendered the permit and became non-viable ,need not be granted marks for viable units and this concept has been upheld by the Appellate Tribunal. In case this tendency is not cured, the operators will always try to manoeuvre by giving out unremunerative units from viable ones." The approach of the State Transport Appellate Tribunal was that the revision petitioner claimed the permit with a view to compensate for the loss of the permit on the unremunerative unit voluntarily surrendered by him without any consideration to the interests of the public on the sectors served. To buttress this finding, it is stated that no material had been placed with the Regional Transport Authority for dropping the route or the route for which the permit was surrendered as unnecessary.

9. The finding is attacked by the learned counsel on two grounds (1) surrender *per se* is not a disqualification and it has been categorically laid down so in W.P. No. 1048 of 1966. As laid down in that decision, it ought to have gone into the circumstances which led to the surrender of the permit. But, it did not do so. Added to this, I.A. No. 1205 of 1971 was filed to call for certain records, which would establish the circumstances under which the surrender was made and the order passed by the Regional Transport Authority thereon. This interlocutory application was allowed and the respondents were directed to file their objections by an order, dated 13th October, 1971. The failure to advert to the records, which were directed to be sent for, is a material irregularity vitiating the order. If the records were perused, that would clearly establish that the route for which the permit—was—surrendered,—*viz.*,—Pollachi—to Anamalai, was a non-remunerative route on account of poor collection. In such a case, it would be a national waste on the part of the operator to run the route. The order of the authorities in refusing the four marks, which his client would be entitled to under Rule 155-A (3) (*f*) is, therefore, incorrect. If the said marks had been awarded, his client would have secured the highest number of marks, *viz.*, 14, which undoubtedly would have made the authorities concerned, to grant the permit in his favour.

10. Mr. G. Ramaswami, learned counsel for the respondent, *viz.*, the grantee by the State Transport Appellate Tribunal, meets the above arguments in the following manner.

11. As regards the non-performance of the revision petitioner in C.R.P. No. 864 of 1972, the Tribunal held in paragraph 12 of its order, after referring to the various orders and the circumstances under which there was non-performance by the 4th appellant before it, that the 4th appellant had obtained permission from the concerned authority to run a spare bus for the month of December, 1970 and January, 1971 and was maintaining the spare bus excepting for three days and even during those three days, the respondent could not place materials to show, operation by any other operator on that route. This is a factual finding and in support of this finding the Interlocutory Application was taken to produce the relevant document, and therefore, no exception could be taken to this finding.

12. As regards sector qualifications, that is one of the relevant considerations under section 47 (1) (*e*) of the Act. It will depend on each case as to whether by the grant of a permit to an operator, who was already covering the full sector on the route in question, it would constitute a predominant influence, as laid down in *Rama Vilas Service* v. *Raman and Raman Limited*[1]. In the instant case the State Transport Appellate Tribunal took that into consideration and found that the predominant influence was not a ground urged by any of the objectors.

1. (1959) 2 M.L.J. 1 : (1959) M.L.J. (Crl.) 352 : 72 L.W. 474 : I.L.R. (1959) Mad. 641 : A.I.R. 1959 Mad. 492.

13. In reply to the contention of the revision petitioner in C.R.P. No. 1427 of 1972, the learned counsel urges that the proposal to open the route in question was on 15th April, 1970 and the surrender was on 30th April, 1970. This itself will clearly show that the surrender was *mala fide* with a view to secure the 4 marks for a viable unit. Even this apart, where an operator surrendered because it was a non-remunerative route, certainly it would cause inconvenience to the public and on the ground of public interest, it is well open to the authorities charged with the function of granting permit, to prefer another operator and that was what was done by the Tribunal.

14. Concerning the failure to advert to the records, the approach of this Court may be in either of the two ways. If the records were there and if it had failed to advert to the records, it would have been a different matter. But, notwithstanding the order, dated 13th October, 1971, the records which were filed in Appeal No. 1130 of 1970, were not before it when this appeal was argued. Therefore, no question of failing to advert to the records would arise, in which case, there is no material irregularity or failure to exercise its jurisdiction. Even the grounds of revision proceed on this basis.

15. The other approach is, that even the so called records merely disclosed that the route for which the permit was surrendered need not be reopened since a longer route covering the said area was in contemplation. That again, in any event, cannot be held to be in favour of the revision petitioner so as to claim the 4 marks on the ground of viable unit. The factual finding is that there is a transfer of permit.

16. In W.P. No. 65 of 1970, more or less under similar circumstances, this Court has held that on this factual finding, the order of the authority should not be interfered with. After the award of the marks, public interest is the prime consideration and after all in a case of this kind, it is well open to the authorities to prefer an operator securing 13.57 marks as against an operator securing 14 marks (even assuming that the said operator is entitled to the 4 additional marks), and need not be solely guided by the higher number of marks alone. In support of this submission, the learned counsel relies on *K. Balasubramania* v. *N. M. Sambandamoorthy*[1].

17. I will now advert to the merits of the various contentions advanced by the respective counsel.

18. As regards the non-performance of the respondent for three days, there has been an elaborate discussion in paragraph 12 of the order of the Tribunal and ultimately it came to the conclusion that on that ground it should not be held that the respondent was not entitled to the permit since no great weight should be given to the non-performance for these three days. I am unable to agree with Mr. T. Chengalvarayan, learned counsel for the revision petitioner in C.R.P. No. 834 of 1973 that what operated in the mind of the Tribunal was the failure to take action against the non-performance. It merely puts it, as one of the circumstance, but that was not the sole basis. In W.P. No. 14 of 1968, I find that the action for non-performance proposed under Rule 160-K of the Madras Motor Vehicles Rules was dropped. Therefore, it was contended that the lapse which constituted the basis for the proposed action ought not have been taken into account for setting aside the order of the Regional Transport Authority. Ismail, J., held therein that the facts and circumstances which constituted the basis for taking action under Rule 160-L are not wiped out and are not erased by the simple fact that the contemplated action under Rule 160-L has been dropped, and those facts and circumstances can certainly be taken into account for coming to a conclusion that an operator, who is guilty of such lapses, is not a person to be awarded with a further grant of permit. This is exactly what has happened in the present case.

19. Apart from the factual distinction available in the case, as I said above, in paragraph 12, very many documents are referred to and the factual finding is that the respondent produced a certificate

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1. (1975) 1 S.C.C. 242 : A.I.R. 1975 S.C. 818.

from the President, Mettupalayam Panchayat and the receipt for the bus stand fee issued by the Pollachi Municipality showing that from 29th December, 1970 to 31st December, 1970, the bus stand fee was paid by the respondent's spare bus MDB 4849, and as such the A.B.T. Private Limited were not plying on these three days. Though an attempt was made to disprove this, the Tribunal did not accept that evidence. However, Mr. Chengalvarayan would refer me to pages 172 to 179 of the State Transport Appellate Tribunal's file D.Dis. No. 11288 of 1971, and would contend that, the "attakshi" and the tickets enclosed should not be accepted. I am unable to appreciate this argument. It is well open to the Tribunal to accept this evidence. In any event, this is a factual finding.

20. Regarding the question of predominant influence, the finding of the Tribunal is, that none of the parties took any objection to the grant of the permit to the 4th appellant (the respondent in C.R.P. No. 864 of 1972) on the ground that the 4th appellant is likely to get predominant influence. It has also been further found that the other operators were operating on different portions of this route. As rightly contended by Mr. G. Ramaswami, each case will have to be decided on its own facts and there can be no hard and fast rule concerning this. The following passage in *Rama Vilas Service* v. *Raman and Raman Limited*[1] supports the respondent.

> "It is obvious that in one sense the scheme of grant of permits under the Motor Vehicles Act involves a monopoly to a certain extent. On a particular route only the person who has obtained a permit from the transport authorities can ply a stage carriage. Others cannot. But at the same time, it cannot be denied that it is open to the transport authorities to grant another permit to another person to ply on the same route. The person who had been enjoying so to say a monopoly on that route cannot complain of any legal injury to his right. In that sense there is no question of monopoly (Vide: *C. S. S. Motor Service* v. *State of Madras*[1]. It appears to us that when the word 'monopoly' is used in the orders of the State Transport Appellate Tribunal and the arguments before us, what is meant is that factually a particular operator is the sole operator running several buses on a particular route without there being any competitor. The operator enjoys this favourable position not because he has an indefeasible right to such enjoyment but because it happens that he holds all the permits on that particular route for a particular period. It may be that at the end of the period when he applies for renewal of the permit he may not be able to secure a renewal because there are other applicants more qualified who may be granted the permit. We need not embark on a discussion of the merits and defects of monopoly from the point of view of economic development. In certain circumstances monopoly in a particular kind of trade or business may be in the interest of the public but in other circumstances it may have a contrary effect and may be destructive of individual enterprise, and free competition is the life of business. Having regard to the present system in vogue relating to the grant of stage carriage permits, if monopoly in the strict sense should be avoided, then there should not be grant of a single permit to one operator on any particular route, for that would mean that the State has conferred on such operator a monopoly in the carrying on of the business on that route. Monopoly, therefore, should be understood as undue concentration of a number of permits in the hands of a single operator on any route, excluding competition from other operators."

This is also a relevant consideration as adumbrated in section 47 (1) (*e*) of the Act. Where a Tribunal chooses to prefer a three bus operator as against a four bus operator for the purpose of viable

1. (1959) 2 M.L.J. 1 : (1959) M.L.J. (Crl.) 352 : A.I.R. 1959 Mad. 492.

1. I.L.R. (1953) Mad. 304 : 66 L.W. 85: (1952) 2 M.L.J. 894 : A.I.R. 1953 Mad. 279.

unit, I am unable to hold that the order is, in any way, vitiated.

21. Turning to C.R.P. No. 1427 of 1972, no doubt surrender *per se* is not a disqualification. To that extent, Mr. K. K. Venugopal is correct in his submission. It has been laid down in W.P. Nos. 1048, 1419 and 1484 of 1956, by Rajagopala Ayyangar, J. that surrender by itself would not be a disqualification, and it depends upon the circumstances in which the surrender was effected *viz.*, whether by surrendering the permit inconvenience was caused to the travelling public or whether he had thereby or otherwise manifested his unwillingness or inability to operate effectively the permit granted to him. This would be a pure question of fact to be based on all the relevant material.

22. In the instant case, I see no justification for the attack made by Mr. Venugopal that the records which were directed to be sent for in I.A. No. 1205 of 1971 under order, dated 13th October, 1971 were not adverted to by the Tribunal. Notwithstanding the order, these records were not before the Tribunal at the time of hearing. Therefore, there is no failure to exercise the jurisdiction. Where the Tribunal finds that the surrender of the permit was to enable the operator to gain more marks under the heading 'viable unit' certainly, it can take into consideration that fact in public interest. What is urged before me is that it was non-remunerative as far as the operator was concerned. The unremunerativeness may be due to ever so many circumstances and may even include the failure of the operator to provide an efficient service

23. As rightly pointed out by the Tribunal in the matter of grant of permit "the interest of the public" is a paramount consideration and not the interest of the particular applicant, like the second appellant who is an existing operator plying vehicles. Even assuming that the revision petitioner will be entitled to 4 additional marks, that cannot be the sole criterion on which the permit could be granted. In my view, that would not be conclusive of the issue.

24. On identical circumstances, their Lordships of the Supreme Court held in *K. Balasubramania* v. *N. M. Sambandamoorthy*[1] as follows at pages 821-822 :

"But that by itself would not be determinative of the controversy. The paramount consideration to be taken into account in determining as to which of the applicants should be selected for grant of permit always is public interest. Section 47 (1) provides in so many words that the Regional Transport Authority shall, in considering an application for a stage carriage permit have regard *inter alia*, "to the interest of the public generally", and this is a consideration which must necessarily outweigh all others. It is ultimately on the touchstone of public interest that selection of an applicant for grant of permit must be justified. Clause (3) of Rule 155-A undoubtedly provides for giving of marks to the rival applicants but the number of marks obtained by each applicant can only provide a guiding principle for the grant of permit. It can never override the consideration of public interest which must dominate the selection in all cases. In fact clause (4) of Rule 155-A concedes that after the applicants were ranked according to the total marks obtained by them the applications shall be disposed of in accordance with the provisions of section 47 (1). The fact that the appellant had 11 marks as against 7.40 of the respondent would certainly be a factor in favour of the appellant, but notwithstanding his higher marks, if public interest so requires, he may have to yield place to the respondent in the matter of selection for grant of permit."

This decision, in my view, affords the complete answer to the argument of Mr. Venugopal. Since the basis of the attack in grounds Nos. 3, 4 and 5 of the Memorandum of grounds for the revision, was that the Tribunal acted with material irregularity in not referring to the records, I myself perused those records. They do not, in any way, advance the case of

1. (1975) 1 S.C.C. 242 : A.I.R. 1975 S.C. 818.

the revision petitioner. As pointed out by Rajagopala Ayyangar, J., in W.P. Nos. 1048, 1419 and 1484 of 1956, the examination of the facts has to be done. Such an examination here reveals that on account of poor collection, which the bus was getting, the operators proposed to surrender the permit and if the surrender is accepted, the new route as proposed for T.P. may be opened pending finalisation of the arrangements to open the new route. On this, the following order was passed :

"The orders of the Regional Transport Authority could not be implemented because of the amendment to section 48 of the Motors Vehicles Act which has since been published in the Gazette, dated 8th April, 1970. To overcome the difficulty the operator surrendered the permit of the original route and has applied for the grant of a T.P. for the very same route for which T.P. was sanctioned by the Regional Transport Authority. The. T.P. applied for may be issued pending observance of the formalities to issue a pucca permit."

The further order is in R. No. 38654-B1/70, runs as follows:

"Messrs. K. L. S. (P). Ltd., Pollachi were operating their bus MED 5021 on the route Pollachi to Anamalai *via* Samathur, Arasur, Angalakurichi, Kottur and Somandurai, Chittur with shuttle trips between Pollachi and K. Vallankundapuram *via* Samathur, Arasur and Devanurpudur touching Arthanaripalayam. Proposal was initiated to sanction a T.P. to some operators to ply on the route Pollachi to Chellappampalayam. On account of the recent Motor Vehicles Amendment Act the T.P. could not be sanctioned.

Therefore Messrs. Kannan Lorry Service (Private) Limited, Pollachi surrendered the permit stating that the route was unremunerative, that the route was a circuitous one and that the collection of the bus was very poor. Therefore the surrender--was accepted and the permit was cancelled under rule 193 of the Motor Vehicles Rules with effect from 30th April, 1970. Thereafter the route was modified as Pollachi bus stand to Chellappampalayam and a T.P. was also issued in this office R. No. 10488/B2/69 to Kannan Lorry Service (Private) Limited, Pollachi and a proposal to open a new town service route as Pollachi bus stand to Chellappampalayam has also been notified under section 47 (1) of the Motor Vehicles Act. As the route has been modified and as it is proposed to issue pucca permit for the modified route, there is no need to fill up the vacancy of the route surrendered.

Regional Transport Authority: I agree."

25. It is impossible for me to hold that having regard to the proximity of the surrender, *viz.*, the route in question having been proposed on 15th April, 1970 and the surrender having been done on 30th April, 1970, the Tribunal was not correct in concluding that this was done only to gain the marks for viable unit. In fact, the petitioner seems to be more aggrieved because this fact of surrender seems to have weighed against him with regard to the other grants also. This is clear from ground No. 6 of the Memorandum of Grounds for the revision, which is as follows:

"The learned Appellate Tribunal acted illegally and with material irregularity in not applying its mind to the very salient feature, namely, that the petitioner would have obtained the highest marks for the routes (1) Sethumalai to Coimbatore, (2) Anamalai to Palani, (3) Coimbatore to Amaravathinagar, (4) Udumalpet to Coimbatore (route in question), (5) Alamalayam to Coimbatore, (6) Kanniyur to Coimbatore, (7) Mettupalayam to Pollachi (appeal pending), (8) Udmalpet to Coimbatore (appeal pending), (9) Rudrapalayam to Coimbatore, namely, 14, 10.68 13.5, 14, 13.77, 13.86, 13.04, 14, 13.98, marks respectively as against the marks of 11.67 10, 12.22, 11.53, 8.64, 13.386, 12.46, 8.16, 13.74, obtained by the grantee, if it were not for the fact that these 4 marks had been deleted and that as a result they had been in fact

deprived of their right to as many as 9 permits, so that the refusal of these 4 marks would be punitive in character to permanently deprive the petitioner of his right to obtain any permit in future."

26. Whatever that may be, as I held above, where an authority charged with the grant of permit, takes this into consideration and holds that it may not be in public interest to grant a permit to such an operator, the order cannot be held to be, in any way, vitiated.

27. In W.P. Nos. *2657, **3399, *** 3603 of 1970, a Division Bench of this Court held that in a case where out of six permits, two were transferred in favour of the brothers of the operator, notwithstanding the earlier order of the Tribunal on a review of the circumstances, the Tribunal in the instant matter was of the view that the reduction was possible to get advantage of being a non-fleet owner and thus get weightage for building up a viable unit, the matter was a factual one and they declined to interfere with that finding.

28. Even earlier, I have referred to the factual finding of the Tribunal that in the present case the permit was surrendered to compensate for the loss of the permit on the non-remunerative route voluntarily surrendered by him without consideration of the interest of the public on the sector served.

29. Exercising revisional jurisdiction and following the ratio laid down in the above ruling, I necessarily decline to interfere. I see no merit in either of these revisions, and in the result, they will stand dismissed with costs.

S.J. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*G. Ramanujam, J.*

M/s. Mettupalayam Industrial Roadways (P.) Ltd., Mettupalayam and another .. *Petitioners**

v.

Thiru Mohamed Ismail Rowther & Co. .. *Respondent.*

(A) *Indian Partnership Act* (*IX of* 1932), *section* 42—*Three persons doing partnership business—Death of one person—Surviving persons continuing business—Whether partnership business dissolved.*

An agreement to the contrary contemplated by section 42 of the Partnership Act need not be in writing but can also be oral. Such arrangement need not be express but can be implied from the conduct of the surviving partners in carrying out the partnership activities. The conduct of the surviving partners in the instant case in continuing the partnership business suggested that there should have been an agreement that the death of a partner will not result in the dissolution of the firm.

[*Paras.* 8 *and* 9.]

(B) *Motor Vehicles Act* (*IV of* 1939), *section* 57—*Grant of permit—Considerations.*

Cases referred to :—

Sayyed Abdul Huq v. *Tumuluri Vaikuntam*, (1927) 52 M.L.J. 318 : A.I.R. 1927 Mad. 491; *Dwarakadas & Co.* v. *Income-tax Commissioner*, A.I.R. 1956 Bom. 321; *Kesarchand* v. *Uttam Chand*, (1945) 2 M.L.J. 160: 72 I.A. 165 : 58 L.W. 375: A.I.R. 1945 P.C. 91 *G. S. Oswal* v *R. V. Dixit*, A.I.R. 1956 Nag. 46; *Ajantha Transports* v. *T. V. K. Transports*, (1975) 1 S.C.C. 55 : (1975) 2 S.C.R. 166 : A.I.R. 1975 S.C. 123; *Kesramal* v. *Dalichand*, A.I.R. 1959 Raj. 140; *Tulasiram* v. *Anni Bai*, A.I.R. 1963 Orissa 11; *P. B. (P.) Ltd.* v. *S. T. A. Tribunal, Punjab*, (1975) 1 S.C.J. 196 : (1974) 2

* C.R.P. No. 2671 of 1972 and 1029 of 1973.

19*th December*, 1975.

S.C.C. 245 : A.I.R. 1974 S.C. 1174; *K. Balasubramania* v. *N. M. Sambandamoorthy*, (1975) 1 S.C.C. 242 : A.I.R. 1975 S.C. 818.

Petitions under section 64-B of the amended provisions of Motor Vehicles Act (Madras Act XVI of 1971) praying the High Court to revise the order of the Court of the Additional State Transport Appellate Tribunal, Madras dated 10th April, 1972 and made in A. No. 1064 of 1971 and 1038 of 1971 respectively (R. No. 77497/B2/68, R.T.A., Coimbatore).

M. R. Narayanaswami for *P. Shanmugham*, for Petitioner in C.R.P. No. 2671 of 1972.

M. Kalyanasundaram for *G. R. Lakshmanan*, for Petitioner in C.R.P. No. 1029 of 1973.

T. Chengalvarayan, for Respondent.

The Court made the following

ORDER.—As these two revisions filed by two different Transport operators are directed against the same order of the State Transport Appellate Tribunal Madras, dated 10th April, 1972, they are dealt with together.

2. A proposal for the introduction of two additional buses on the route Coimbatore to Mettupalayam was notified and after considering the representations received, the proposal was approved for one bus. Applications were, therefore, called under section 57 (2) of the Motor Vehicles Act. There were as many as 56 applicants and the petitioners in these cases were applicants 25 and 36 respectively while the respondent in both the cases was the 23rd applicant. The applications were duly notified under section 57 (3). In its hearing held on 31st July, 1971, the Regional Transport Authority rejected the claim of applicant No. 36 on the ground that he had been given a permit for the route Coimbatore to Viscose factory in the same sitting and the application of the 25th applicant on the ground that he is only a new entrant and ultimately granted the permit to applicant No. 23. Applicants 25 and 36 challenged the order of the Regional Transport Authority before the State Transport Appellate Tribunal by filing two appeals. The said two appeals were, however, dismissed. Hence the Tribunal's order has been challenged by the same applicants in these two revisions.

3. The contention of the learned counsel for the petitioners in both the cases is that the 23rd applicant who has been selected for the grant of the permit both by the Regional Transport Authority and by the Tribunal is not entitled to get the permit in preference to the petitioners, that the Regional Transport Authority as well as the Tribunal have erroneously assumed that the respondents Mohammed Ismail Rowther and Company, is the same firm which applied for the permit on 22nd October, 1960, that the firm which applied for the permit in the year 1960 ceased to exist now and that therefore, the grant in favour of that firm which has ceased to exist cannot be sustained. If the permit granted to the respondent cannot be sustained on that ground, then the grant may be made after consideration of the relevant claims of applicants 25 and 36 alone. As between applicants 25 and 36, one is putting forward superior and preferential claims over the other.

4. Before dealing with the rival claims put forward by applicants 25 and 36 amongst themselves, it is necessary to consider the common attack made by the petitioners against the grant of permit in favour of the 23rd applicant, the respondent in both the cases. It is the case of the petitioners that the respondent firm had only two partners, namely K. Mohammed Ismail (Senior) and K. Mohammed Ismail (Junior) on the date of the application as seen from the application itself, that one of the partners namely Md. Ismail (Junior) died in the year 1969, that the firm should be taken to have been dissolved since 1969 and that, therefore, the grant of the permit on 31st January, 1971 to a firm which is non-existent cannot at all be sustained. The respondent repels the said contention stating that though there were two partners on the date of the application, subsequently one Yusuf joined the firm as a partner in 1967, that the firm had therefore 3 partners in the year 1969 when

one of the partners died, that the two surviving partners continued the firm and that therefore the grant in favour of the firm has rightly been made on 31st July, 1971 by the Regional Transport Authority. To show that the firm was continued with two partners on or after 1969 when one of three partners died, the respondent relied on the fact that the firm in addition to carrying-on of the firm's lorry business, had also started transport business by applying for a permit on the route of Mettupalayam to Karamadai on 22nd November, 1967 and produced the registration certificates of the lorry and of the bus. It also relied on the fact that from 1967 the firm is actually plying a lorry and also a bus from Mettupalayam to Karamadai. The respondent also contended that the continued conduct of the firm's business by the two partners would indicate that there was an agreement to continue the partnership in spite of the death of one of the partners.

5. The Tribunal considered in detail the above objection raised by the petitioners which, if accepted would disentitle the respondent from getting the permit. Though this was raised for the first time before the Tribunal, it held that though the firm was originally comprised of two partners in the year 1960 when the application was filed, one Yusuf having been admitted as a third partner in the year 1967, on the date of death of one of the partners namely Mohammed Ismail in 1969, there were two partners surviving, that they had continued the firm's business as per an implied agreement between the three partners, that, the firm which applied for the grant in fact continues and that, therefore, the grant in its favour cannot be challenged on the ground that the grant is to a non-existent firm. The petitioners have attacked the said finding of the Tribunal that the grant in this case is to a firm which applied for a permit in the year 1960.

6. The learned counsel for the petitioners has not, however, challenged the finding of the Tribunal that though the partnership was constituted with two partners originally in the year 1960, a third partner by name Yusuf was taken in 1967 and that it is only thereafter in the year 1969 one of the partners died leaving two surviving partners and that the said two surviving partners are carrying on a partnership business in bus and lorry transport. Therefore, the only question that has to be considered is whether the surviving partners can be said to have continued the old partnership in pursuance of an agreement between the partners that the firm shall not be dissolved by the death of one partner.

7. The learned counsel for both the petitioners contends that normally a firm is dissolved by the death of a partner unless there is a contract to the contrary between the partners, that in this case the respondent has not produced any agreement to the effect that the firm is to be continued notwithstanding the death of the partner in 1969 and that in the absence of such an agreement between the partners the firm of Mohammed Ismail Rowther and Company which applied for a permit in the year 1960 should be taken to have been dissolved by the death of Mohammed Ismail, one of the partners. The learned counsel refers to section 42 of the Indian Partnership Act which provides that subject to a contract to the contrary between the parties a firm is dissolved by death of a partner. It is not in dispute that the respondent has not produced any agreement in writing between the partners to continue the partnership in spite of the death of a partner. The Tribunal has, however, taken the view that from the fact that the surviving partners continued the same partnership business an agreement to that effect should be implied, and that the continuation of the bus and lorry operations by the two surviving partners even after the death of one of the partners will lead to the inference that the death of a partner shall not result in the dissolution of the partnership firm. In taking that view, the Tribunal took into account the fact that the partnership is not constituted for a fixed term, that it is an unregistered one constituted for carrying on a transport business, that two surviving partners continued to carry on the same bus or lorry business which was originally carried

on by the three partners. This reasoning of the Tribunal is attacked by the learned counsel for the petitioners as unsound.

8. The learned counsel for the petitioners refers to the decision of Ramesam, J., in *Sayyed Abdul Huk* v. *Tumuluri Vaikuntam*[1]. In that case the Court expressed the view that though a contract to the contrary within the meaning of section 253 of the Contract Act (section 42 of the Partnership Act) need not always be express and can be inferred from certain facts, the mere existence of an adventure is not such a fact leading to an inference of an agreement to the contrary and the relevant observations are these:

> "It is not possible to hold that wherever there is an adventure that itself amounts to a contract to the contrary. I do not say that 'a contract to the contrary' should be always express. It may be that it can be inferred from certain facts but it seems to me that the mere existence of an adventure is not such a fact as leads to the inference of an agreement to the contrary."

But the above case related to the interpretation of section 42 (*b*) of the Partnership Act dealing with the dissolution of the firm by completion of an adventure and, therefore, the said decision that from the mere existence of an adventure one cannot infer an agreement to the contrary cannot be taken to be a direct decision on the point in question. It is well-established that an agreement to the contrary contemplated by section 42 of the Partnership Act need not be in writing but can also be oral. It is equally well-established that such an agreement need not be express but can be implied from the conduct of the surviving partners in carrying out the partnership activities. In *Dwarakadas & Co.* v. *Income-tax Commissioner*,[2] a Division Bench of the Bombay High Court consisting of Chagla, C.J., and Tendolkar, J., had expressed the view thus:

> "What is overlooked is that the law does not require that a partnership deed should be in writing. The agreement of partnership may be oral and the oral partnership agreement is as effective as a written partnership agreement. It is, only for the purpose of section 26-A and for the purpose of registration, that an instrument of partnership is necessary, and partners who have already started doing business by an oral agreement would be perfectly justified in saying to themselves......"

The above decision proceedes on the basis that an agreement to form a partnership may be oral and, therefore, an agreement to the contrary contemplated by section 42 can also be oral, provided such an oral agreement is entered into before the death of a partner. In *Kesar Chand* v. *Uttam Chand*[1], Sir Madhavan Nair, held that where a partnership firm has gone on as a living concern continuously since the time it was started, notwithstanding the death of some members of the firm with the surviving partners or by the legal representatives of the deceased partner taking his place, death should not be taken to result in the dissolution of the firm. In *G. S. Oswal* v. *R. V. Dixit*[2], a Division Bench took the view that the existence of an agreement between the partners to the effect that the death of the partner will not cause dissolution of the partnership can be inferred from the conduct of the parties. In that case in spite of the intervening death of partners, the partnership was continued by the legal-representatives of the deceased partners stepping into their shoes and this was taken as sufficient to raise a plea of existence of an agreement to the contrary between the partners as contemplated in section 42, though there was no direct evidence of an express agreement to the effect that the partnership would not be dissolved on account of the death of the partner. In *Kesramal* v. *Dalichand*[3], the Court has also taken the same view

1. (1927) 52 M.L.J. 318 : A.I.R. 1927 Mad. 491.
2. A.I.R. 1956 Bom. 321.

1. (1945) 2 M.L.J. 160 : 72 I.A. 165 : 58 L.W. 375 : A.I.R. 1945 P.C. 91.
2. A.I.R. 1956 Nag. 46.
3. A.I.R. 1959 Raj. 140.

and the reasoning contained therein is as follows:—

"It is true that section 42 of the Partnership Act provides that a firm is dissolved by the death of a partner. It must, however, be remembered that this would be subject to contract between the partners as the opening words of section 42 go to show. Again, it is not necessary that a contract between the partners in this connection need be express, but may be implied and it may be possible to spell out such a contract from the subsequent conduct of the surviving partner and the heirs of the deceased. Whether a firm which should have otherwise been dissolved by the death of one of its partners, still continued to exist without being dissolved, would depend on the facts and circumstances of each case."

In *Tulsiram* v. *Anni Bai*[1], it has been held that though normally a partnership firm would stand dissolved on the death of a partner unless it is otherwise contracted for, if it is found from the subsequent conduct of the parties that despite the death of a partner the partnership continued and functioned with the surviving partners, then it would be taken that it continued by virtue of a contractual relationship.

9. Having regard to the principles laid down in the above cases, the conduct of the surviving partners in this case in continuing the partnership business will lead to the inference that there should have been an agreement that the death of a partner will not result in the dissolution of the firm. Therefore, the Tribunal's finding that the respondent firm which has been granted the permit is the firm which had applied for a permit in the year 1960 has to be accepted.

10. This leads to the further question as to who among the three applicants is entitled to the permit. As regards the 36th applicant, the Regional Transport Authority has excluded him from consideration on the ground that he has been granted a permit in the same sitting. It excluded the claim of the 25th applicant on the ground that he has experience only in lorry operations and not in the bus operation while the 23rd respondent has experience in bus operations. The Tribunal has taken the view that the 25th applicant is not entitled to two marks for experience as granted by the Regional Transport Authority and, therefore, he is entitled only to two marks as against four marks which the 23rd applicant is entitled to get. It is not in dispute that the Regional Transport Authority while awarding two marks for experience in the case of the 25th applicant took into account the experience of one Madhayya, who claimed to be the managing director in bus operation. Before the Tribunal it has been established that the said Madhayya, was not its managing director on the date of the grant. The fact that the said Madhayya, was not the managing director on the date of the grant has not been disputed before me. What is stated by the learned counsel is that the said Madhyya, has been made a director-in-charge of the lorry business and, therefore, his experience in lorry operation should be taken into account. But it is not disputed by the learned counsel for the petitioners that it is only the managing director's experience in bus operation that can be taken into account and not the experience of everyone of the directors or shareholders of the company. Therefore, the Tribunal appears to be right in its finding that the two marks awarded to the 25th applicant for experience on the ground that its managing director had experience in lorry operation cannot be sustained, and, therefore, the 25th applicant should be taken to have obtained only two marks as against four marks given to the 23rd applicant.

11. Thus, excluding the 25th applicant as a person getting lesser marks it only remains to be considered the claim of the 36th applicant who also secured four marks. He has not been considered for the grant only on the ground that he has been granted a permit in respect of another route in the same sitting. The learned counsel for the 36th applicant brings to my notice the decision of the Supreme Court in *Ajanatha Transports* v.

1. A.I.R. 1963 Orissa 11.

T. V. K. Transports[1], wherein it has been held that the relevance of the previous possession or grant of a permit appears only when other facts and circumstances connecting it with and showing either the adverse or beneficial effects of its impact, in a particular case, on the interest of the public are shown to exist, and that unless and until these other facts and circumstances indicating the nexus or connection with public interest appear, such a fact by itself should not affect an application for a permit and that the weight to be attached to such a consideration will, obviously, depend upon the totality of all such facts and circumstances viewed in a proper perspective. Reference has also been made to a decision of the Supreme Court, in *P. B. Pvt. Ltd.* v. *S. T. A. Tribunal, Punjab*[2], which has set down the main considerations required to be taken into account for granting a permit under section 47 as the interest of the public in general and the advantages to the public of the service to be provided including the consideration of factors such as the experience of the rival applicants, their best performance, the availability of stand by vehicles with them, their financial resources, the facility of well-equipped workshop possessed by them etc., and the failure to take into account of these considerations and proceeding as if the stage carriage permits are granted on the basis of a fair and equitable division among the rival applicants is wholly erroneous. Again in *K. Balasubramania* v. *N. M. Sambandamurthy*[3], the Court pointed out that under section 47 (1) it is ultimately on the touchstone of public interest that the selection of an applicant for grant of permit must be justified and the mere fact that an applicant has more than one permit or he is a recent grantee cannot by itself be regarded as a factor against him in the matter of granting permits in the comparative scale, unless the facts and circumstances indicate that the grant of a permit to him will not serve the interest of the public generally. On this aspect the Tribunal has upheld the order of the Regional Transport Authority rejecting the claim of the 36th applicant on the ground that he was given another permit at the same sitting as in its view the grant of the permit at the same sitting is a proper ground for elimination. In view of the above decisions of the Supreme Court, the rejection of the application of the 36th applicant on the only ground that he has been granted a permit at the same sitting both by the Regional Transport Authority and by the Tribunal is not proper. The Regional Transport Authority as well as the Tribunal have not compared the claims of the 23rd and 36th applicants as the 36th applicant's claim has been rejected on an erroneous ground. Now that applicant No. 25 goes out of the picture, the rival claims of the 23rd and 36th applicants have to be considered by the Tribunal which it has not done in the impugned order. Civil Revision Petition No. 1029 of 1973 is therefore allowed with a direction to the Tribunal to consider the appeal of the 36th applicant afresh and in the light of the above observations. Civil Revision Petition No. 2671 of 1972 is dismissed. There will, however, be no order as to costs.

C.R.P. No. 1029 *of* 1973
allowed and C.R.P. No. 2671
of 1972 *dismissed.*

R.S.

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1. (1975) 1 S.C.C. 55 : (1975) 2 S.C.R. 166 : A.I.R. 1975 S.C. 123.
2. (1975) 1 S.C.J. 196 : (1974) 2 S.C.C. 245 : A.I.R. 1974 S.C. 1174.
3. (1975) 1 S.C.C. 242 : A.I.R. 1975 S.C. 818.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao* and *S. Ratnavel Pandian, JJ.*

Parasumanna Lakshmanier .. *Appellant**

v.

P. L. Krishnamachary and others .. *Respondents.*

Hindu Law—Joint family property—Notice for partition given by a member—Manager's position thereafter—Gifts of family property by father-manager to daughters after such notice—Gifts not valid.

There were disputes among the members of a joint family and the matter was referred to some Panchayatdars for partition. This was not completed. Subsequently, the father made certain settlements in favour of his daughters out of the joint family property and the validity of these gifts was challenged by a son of the donor.

Held : When once one of the members of the joint family, for instance, a son, unequivocally informs his father of his unambiguous desire to sever his connection with the joint family and so disrupts the joint family status, then the manager, though the father, cannot assume the garb of managership and deal with the joint family assets in his own right and particularly alienate them or gift them away to others including the kith and kin of the family.

No sonner an intention to disrupt the status of the joint family had become open and public, the conduct of the father in executing the gifts in favour of his daughters long after the submission of the disputes to the arbitrators was certainly an act without authority and it would not bind the other members of the family including the plaintiff. The gifts could not be upheld. [*Para.* 17.]

Cases referred to :—

Puttarangamma v. *Ranganna*, (1968) 2 S.C.J. 668 : A.I.R. 1968 S.C. 1018 ; *Narayanaswami Iyer* v. *Rama Krishna Iyer*, (1965) 1 M.L.J. (S.C.) 78 : (1965) 1 An.W.R. (S.C.) 78 : (1965) 1 S.C.J. 522 : (1964) 7 S.C.R. 490 : A.I.R. 1965 S.C. 289.

Appeal against the decree of the Court of the II Additional Subordinate Judge, Madurai, in Original Suit No.456 of 1967 dated 25th April, 1970.

O. V. Baluswamy, for Appellant.

P. Muthukumaraswamy and *R. Shanmugham* for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—In Appeal No. 286 of 1970, the first defendant in O.S. No. 456 of 1967 on the file of the Court of the Subordinate Judge, Madurai, is the appellant ; the second defendant is the appellant in Appeal No. 287 of 1970 ; and defendants 5 to 7 are the appellants in Appeal No. 272 of 1971. Parasumanna Lakshmanier the first defendant was adopted to one Parasumanna Chakrapani Iyer. The plaintiff and defendants 3 and 4 are his sons; the second defendant is his wife; and defendants 5 to 7 are his daughters. The plaintiff has instituted this suit for partition, including in the plaint, three schedules A, B and C.—A. schedule relating to immovable properties, B schedule to moveables and C schedule to outstandings. He claims an ¼th share in all such properties delimited by him in the various schedules which according to him are joint family properties. It is common ground that the first defendant was adopted to Chakrapani Iyer. The plaintiff's case is that Chakrapani Iyer, was doing several kinds of business and in the course of such varied avocations acquired properties, both movable and immovable. The first defendant as the adopted son and as a member of the coparcenary consisting of Chakrapani Iyer and himself continued the ancestral business set up by Chakrapani Iyer, and in the exercise of the profession and calling, the plaintiff claimed that the first defendant (as father) purchased and acquired the schedule—mentioned properties. In that view himself and defendants 3 and 4, as the sons and undivided members of the joint family consisting of themselves and his father, are entitled to a partition and

* A. Nos. 286 and 287 of 1970 and 272 of 1971. *31st January*, 1975.

separate possession of ¼th share in them. He has set out the manner in which Chakrapani Iyer, initiated his business and how it was continued by the first defendant and would add that the various immovable properties either standing in the name of the first defendant or in the name of one or the other members of the family including the mother, the second defendant, are all properties acquired from joint family nucleus and income and hence have to be treated and considered as joint family properties. He refers to a Panchayat held in or about the 3rd February, 1966, which Panchayat was occasioned by some internal disputes in the family and says that five Panchayatdars, under muchalika dated 3rd February, 1966, entered upon the reference and the members interested submitted a list of properties of the joint family and also the outstandings, but for reasons not very specifically stated, the arbitration fell through. The plaintiff would refer to two settlement deeds dated 2nd August, 1967 one in favour of defendants 5 and 7 and the other in favour of the sixth defendant whereby certain items set out in plaint A schedule were settled on the daughters which the plaintiff challenges as alienations which ought not to have been done by the father-manager after there was an unequivocal declaration by one at least of the members of the joint family to sever joint family status. According to him, the unambiguous reference to the Panchayatdars to adjust the differences which by then arose as between the members of the joint family by itself is a transaction indicative of the intention of one of the coparceners to separate from the joint family and the attempt of the father manager after such intention has been so declared to deal with the properties of the joint family by settling one or more of them in favour of the female members of the family is not permitted in law. He would claim that the 86 items of moveables such as the furniture, vessels and jewels mentioned in the B schedule do also constitute joint family assets and are liable to be partitioned amongst the sharers. He has set out in the schedule C. 29 items of outstandings of which one is admitted by the third defendant to be due and payable by him. The rest of the items are claimed to be outstandings which are payable to the joint family as such and therefore constitute joint family assets which in their turn also have to be brought into the hotchpot for the purpose of division.

2. The first defendant's case is that he was no doubt adopted to Chakrapani Iyer, but Chakrapani Iyer, by himself did not have any business of his own nor was he in affluent circumstances so as to provide him with any joint family nucleus to enable him to trade with such capital provided for and to acquire properties therefrom. The first defendant's specific case is that he started business on his own in 1917 before the plaintiff and defendants 3 and 4 are born and that all the properties excepting item 1 of the A schedule to which we shall presently advert to are his own self-acquired properties in which neither the plaintiff nor defendants 3 and 4 have any interest by birth as coparceners of the family.

3. The second defendant in her separate written statement supports her husband and further contends that item 7 of the A Schedule belongs to her absolutely as she inherited the same from her mother who was carrying on a karupatrai business successfully and that it was with the funds so provided by her mother that she acquired item 7 of the plaint A schedule. She would also allege that she is possessed of jewels, vessels, furniture, cash and outstandings which belonged to her, the origin of which she would trace to the provision made by her mother Meenakshiammal from time to time from the business which she was independently carrying on.

4. The third defendant generally supports the plaintiff. As we said he admits that some amounts mentioned as item 9 in the C schedule as an outstanding to the family is payable by him which debt apparently he has incurred in the course of his working of his own business called Saraswathy Textiles. He would add that on a partition being directed, a provision has to be made for the marriage expenses of his daughters who are members of the family and he claims that he is entitled to an 1/4th share in the joint family assets.

5. The fourth defendant also supports the plaintiff.

6. Defendants 5 to 7 stand by the settlement deeds effected by their father in their favour and would say that the gifts in their favour bear an infinitesimally small proportion to the totality of the assets of the joint family and therefore such gifts have to be upheld even if the joint family father—manager did settle the properties after one of the coparceners had notified his intention to separate from the family. Even otherwise, the gifts have to be upheld as it is not unreasonable for a father to settle a small part of the joint family assets in favour of his married daughters.

7. In the application filed by the plaintiff he would say that Chakrapani Iyer, was not as poor as was depicted by the first defendant and that the account books which he was prepared to disclose during the trial would disclose that there was continuity in the business originally conducted by Chakrapani Iyer, and later undertaken by the first defendant and such nexus being established between the business originally started by Chakrapani Iyer, and later continued by the first defendant, the entire commercial activities have to be treated as a joint family activity and that the properties acquired by the first defendant in the course of the exercise of such an avocation or profession should be treated as such and partitioned amongst the sharers. Countering his mother's written statement, the plaintiff would say that she was always dependent upon the first defendant for her maintenance, that she had no independent means and that the story that, Meenakshiammal, her mother, did have a karupatrai business and that she left substantial cash for her to own not only the property purchased by her as item 2 in the plaint A schedule but also the jewels and the outstandings standing in her name and claimed by her as own is false and those items have all to be treated as joint family properties and brought to the hotchpot for division. In the reply statement it is further said that the superstructure over item No. 7 also belonged to the joint family and the funds for the purchase of the site of item 7 in the name of the second defendant came only from the joint family properties or funds. The settlement deeds in favour of the sisters are once again attacked as gifts without authority. As regards the muchalika, the case of the first and second defendants in their written statements was that they were forced to sign the same and this statement is denied in the reply statement. In the result, the plaintiff reiterated what all he stated in the plaint and sought for the reliefs originally prayed for.

8. On the above material pleadings, the following issues were framed:

(1) Whether the properties detailed in the schedules to the plaint (other than A schedule items 1, 2 and 7) were acquired by the first defendant with the aid of ancestral joint family assets or have been treated as joint family properties and whether they are joint family properties of the plaintiff and defendants 1, 3 and 4?

(2) Whether the A schedule item 2 is joint family property in the hands of the first defendant?

(3) Whether item 7 of A schedule was purchased benami in the name of second defendant and hence available for partition?

(4) Whether the settlement deeds dated 2nd August, 1967 in favour of defendants 5 to 7 (if it is found that the properties dealt with under it are joint family properties) are valid and binding on the plaintiff and defendants 3 and 4?

(5) Whether the assignment deeds by the 1st defendant in favour of defendants 5 and 7 (if the outstandings dealt with thereunder are joint family outstandings) are valid and binding on the plaintiff and defendants 3 and 4?

(6) Whether the 1st defendant out of his own self-acquired funds had put up superstructures on item 1 of A schedule?

(7) Whether the 1st defendant is estopped from claiming the properties as self-acquired properties?

(8) Whether the plaintiff and defendants 3 and 4 are liable to contribute according to their share in 'A' schedule item 1 in the amount, if any, spent by the first defendant over that property, and if so how much?

(9) Whether any outstandings are due to the joint family and if so, what are the outstandings liable for partition?

(10) Whether there are any movables and jewels belonging to the joint family and if so, what are the moveable and jewels available for partition?

(11) Whether the properties and outstandings in the name of the 2nd defendant and jewels in her possession are the joint family properties of the plaintiff and defendants 1, 3 and 4?

(12) Whether the first defendant is liable to render accounts for the management of the alleged family properties and assets as alleged in the plaint?

(13) Whether the first defendant is liable to account for the receipt of monies if any from the Saraswathi Textiles?

(14) Whether the monies advanced by the 1st defendant to Saraswathi Textiles are joint family funds and if so, whether the 1st defendant is liable to account for the same.

(15) Whether the 3rd defendant is liable to account for the assets of and for the income from the Saraswathi Textiles?

(16) Whether the plaintiff and defendants 3 and 4 have in their possession any properties, funds, jewels or other assets of the family?

(17) What are the properties liable for partition?

(18) To what reliefs are the parties entitled.

9. The learned Subordinate Judge found that items 1, 3 to 6 and 8 to 10 are joint family properties and that Chakrapani Iyer, was not poor and unprovided for, that he was doing varied business and that the first defendant continued the main business of Chakarapani Iyer, and earned considerable money by the exercise of such profession and as such the properties as above are all properties purchased by the first defendant with the help of such a joint family nucleus. He held that item No. 2 is joint family property and accepted the second defendant's case as regards item No. 7 and held that it is her own. He upheld the gifts in favour of defendants 5, 6 and 7. As regards schedule B he relied upon Exhibit A-103 produced by the plaintiff but very seriously contended by the appellants as an exhibit on which reliance could not be placed by a Court of law and accepted the case of the plaintiff that most of the items mentioned in schedule B are joint family assets. But while drafting the decree he stated thus:

> "That so far as B schedule moveable properties are concerned, the commissioner so appointed to find out with reference to the list of properties as given as available in room Nos. 2 and 3 in the list appended to Exhibit A-103 and find out among B schedule items 5 to 36 moveable properties, the moveable properties available with each party and allot one such share out of four shares to the plaintiff or its value after equalising the value of each share."

As regards the C schedule properties, the trial Court mechanically accepted the case of the plaintiff and held that the plaintiff was entitled to an ¼th share in the existing outstanding items Nos. 1 to 27 of the C schedule from and out of the amounts recovered from any of the debts mentioned in C schedule by defendants 1 and 2; he also directed an account to be taken as against defendants 1 and 2 though the plaintiff sought for such account-taking as against defendants 1 and 2. It is as against this the appeals as set out already have been filed.

10. The first defendant's case still is that even though he was adopted to Chakrapani Iyer, he was not provided with funds by his adoptive father and that he eked out his livelihood on his own and that too from 1917, at a time when the plaintiff and defendants 3 and 4 were not even born and that therefore the properties set out in schedule A but standing in his name are to be excluded from the periphery of joint family assets. According to him Chakrapani Iyer, was not possessed of funds. This by itself is sought to be sustained by reference to Exhibits B-20, A-93, B-26, B-21 and B-27. Under Exhibit B-20 which is a partition deed between Chakrapani Iyer and his brothers, Chakrapani Iyer, got only a sum of Rs. 20 towards his share. This was in the year 1896. Under Exhibit A-93 dated 10th October, 1896 Chakrapani Iyer purchased

a property for a sum of Rs. 475. But on the very same day he mortgages the same property and finds a sum of Rs. 300 so as to partly satisfy the consideration for purchase of the property under Exhibit A-93. This is item 1 in the A schedule to the plaint. Under Exhibit B-26 of the year 1914 both Chakrapani Iyer, and the first defendant effected mortgages over another property of theirs which is no doubt discharged under Exhibit B-27. Mr. Baluswami, relying upon the above hypothesis wants us to accept his contention that Chakrapani Iyer, was a man of practically no means. It would be difficult to accept his contention. There is abundant evidence in the instant case to show that Chakrapani Iyer, did have assets of his own and he was having varied businesses such as money lending and alizarin dyeing business etc. Exhibit A-55 is a mortgage dated 16th May, 1911 executed by one Venkatachalapathi Iyer, in favour of Chakrapani Iyer, on account of the chit fund transaction which the said Venkatachalapathi Iyer, had with Chakrapani Iyer. Exhibit A-54 is yet another instance to show that Chakrapani Iyer was doing chit fund business. Exhibits A-100 and A-101 which are documents reflecting upon the financial capacity of Chakrapani Iyer are of the year long before even the first defendant was born. The plaintiff, besides referring generally to the above financial capacity of Chakrapani Iyer would also file unimpeachable documentary evidence to show that Chakrapani Iyer, did have a business and that was taken over by the first defendant later and the funds of the said business were augmented more by continuance rather than by the individual efforts of the first defendant. Reference may be made in this connection to Exhibits A-2 to A-52. These are account books covering a period commencing from 1927 and ending with 1964. It is common ground that in these account books we find entries relating to the purchase of items 2 to 6 and 8 to 10. The account books relate to the firm of Chakrapani Iyer and Sons. The first defendant's case is that he adopted this trading style out of deference to his adoptive father and that the appendage 'and sons' has no significance whatsoever. This is a contention which is very difficult for us to accept. If therefore all the purchases of items 2 to 6 and 8 to 10 are reflected in the normal way in the account books of Chakrapani Iyer and Sons, which in our view, is the business which Chakrapani Iyer, initially started and which was later continued by the first defendant, then it is easy for us to find as to whether the first defendant had at all any joint family nucleus to start with for him to augment the resources and secure accretions thereto by his own effort and by exploiting the ancestral trade. Exhibit A-2 is the ledger account for the years 1927 to 1929. The capital accounts as disclosed in the said exhibit is admittedly Rs. 5,928-4-0. Exhibits A-18, A-7, A-11, A-41, A-52 are all the relevant corresponding entries relating to the capital account of the interested members of the joint family business. After Chakrapani Iyer's death, it was the first defendant who continued this business. The sum of Rs. 6,000 in the year 1928-29 improved itself to a sum of Rs. 74,102 in 1964. The first defendant who sought to explain away these entries was unable to show clinchingly as to how this increase in the capital funds and the enormity in the business was solely attributable to his individual efforts without having any impact upon the ancestral trade by custom and its origin.

11. Under Exhibit A-7 it is seen that at or about the time when Chakrapani Iyer, died, there was considerable stock in trade as well. Exhibit A-7 being the business ledger of the firm of Chakrapani Iyer and Sons also discloses the varied types of customers and the volume of business which Chakrapani Iyer had when he was alive. Such stock in trade and such customers were taken over by the first defendant. The learned Subordinate Judge also rightly points out that the first defendant exploited such custom and such credit which Chakrapani Iyer, was enjoying during his life time and continued the business of Chakrapani Iyer and Sons thereafter. It would be therefore idle for the first defendant to say that he started the business on his own in 1917, that the trading style of Chakrapani Iyer and Sons has no special signification of its own and that the later accretions and acquisitions made by him do not have any reference to the ancestral trade or the

joint family. One other special circumstance which was brought to our notice by the learned counsel for the respondent-plaintiff is Exhibit A-70. That was a communication made by the first defendant to the Director of Controlled Commodities, Madras, in 1951. Therein he says that he was carrying on business for nearly 24 years and that he was a dyer by profession and that profession was his ancestral profession etc. It would be difficult to accept the first defendant's present attitude and case if what he stated in Exhibit A-70 is correct. He could have stated in Exhibit A-70 that he was the author of his own business and that he was so doing it on his own and there was neither necessity nor occasion for him to state in a public communication like Exhibit A-70 that it was his ancestral business. The first defendant's conduct in the course of his dealings and continuity of the ancestral business do also lend support to the story of the plaintiff that the family was an undivided one and the assets are joint family properties and that such assets are from the joint family business of Chakrapani Iyer and Sons. The first defendant was an Income-tax assessee. The assessment orders have been marked as Exhibits A-74 to A-89. In all the Income-tax returns the first defendant has described himself as a Hindu undivided family and not as an individual. The learned Judge would consider this aspect in support of his conclusion that the first defendant blended his properties with the joint family property. In our view, no question of blending of self-acquisitions with joint family properties will arise in the instant case as in the course of the continuous conduct, by adaptation of the trading style, by communication to public offices and finally in the Income-tax returns the first defendant specifically gives himself out to the public that the business activity by him is a joint family venture and hat the was conducting it probably as father-manager of the family. It is unnecessary for us to go into the question whether the first defendant blended his self-acquired properties with the joint family properties, for in our view, at no time the first defendant did have any property of his own which can be characterised in law as self-acquisitions for him to lay his hands upon to the exclusion of his sons who claim those assets as joint family assets, as persons having right by birth in them. Having regard to the nature of the documentary and oral evidence let in and which was considered in detail, in our view very diligently, by the learned Subordinate Judge, we have no hesitation to hold that the assets in question excepting such of those items which we shall presently consider and set out in the A schedule are to be deemed and held to be joint family properties.

12. We shall now take up item 1. There is no dispute about the nature and character of this property. This was purchased by Chakrapani Iyer under Exhibit A-93. But what is sought to be made out by the first defendant is that he has considerably improved the property at a cost of Rs. 10,000 and that in the ultimate distribution of the assets of the joint family a provision has to be made whereby he should be reimbursed to the tune of Rs. 10,000 which amount is said to have been spent by him towards the improvement of item. Apart from lack of proof on the part of the first defendant to establish that he did spend a sum of Rs. 10,000 towards such improvement it is difficult to accept the case of the first defendant that he spent his own money for improving the admitted joint family property (item 1 of the A schedule). We have prefaced our judgment by saying that what all was earned by the first defendant was in the exercise of his avocation and exploitation of the business run under the name and style of Chakrapani Iyer and Sons which we have characterised as joint family asset and business. It therefore follows that if he did spend any amount at all so as to improve item No. 1, then it would be from the joint family income or nucleus but not otherwise. We therefore agree with the learned Subordinate Judge that the first defendant is not entitled to claim any portion of the amount said to have been spent by him for the improvement of item No. 1.

13. Regarding item No. 2 this was a property which stood in the name of Nagalammal, wife of Chakrapani Iyer. Exhibits B-34 and B-35 are tax receipts issued in her name in the years 1935-36. As

early as 1959, the first defendant claimed that as son of the mother he was entitled to the property and he was exercising such rights over it as an independent and separate owner thereof. But it is seen that Nagalammal had no independent source by which she could have purchased this property. But it is contended that in Exhibit A-104 which is a settlement deed executed by the first defendant in favour of one of his daughters of one of the suit items of properties, he stated that he provided funds to Nagalammal for the purchase of this property. Mr. Baluswami refers to this and wants us to infer that the said funds provided for by the first defendant being the nucleus from which Nagalammal purchased this property it should be held to be beyond the pale of joint family properties. But in the view that we have already expressed that the family of Chakrapani Iyer which consisted of himself, the first defendant and Nagalammal was by itself a joint family and all the funds held, distributed and spent by either Chakrapani Iyer or by the first defendant should in the circumstances be held to be joint family properties. Merely because the tax was paid in the name of Nagalammal who is none else than the wife of the ancestor, it cannot unless there is proof *aliunde* that she had independent means and source of purchase, be concluded that item 2 is not partible property. We agree with the trial Court that item 2 along with the other properties which we shall presently consider do form part of the joint family assets.

14. As regards items 3 to 6 and 8 to 10, there is no difficulty. The reasoning which we have given in relation to item 1 and the discussion which prompted us to hold that the first defendant continued the business of Chakrapani Iyer and acquired funds for and on behalf of himself and his sons as members of the joint family compels us to hold and agree with the finding of the trial Court that the properties though standing in the name of the first defendant, to wit, items 3 to 6 and 8 to 10 are to be held and treated as joint family properties which are partible amongst the plaintiff, the first defendant and defendants 3 and 4.

15. In so far as item No. 7 is concerned it is a house property in Madurai town. The site was purchased in the name of the second defendant. The plaintiff's case is that this was so purchased from and out of the funds of the joint family. The second defendant's case is that her mother Meenakshiammal was continuing the karapatrai business and that she had sufficient funds of her own from which in turn she provided her with funds and it is by such a provision that a site was originally purchased by her. In so far as the superstructure is concerned, the second defendant's case is that it was her mother Meenakshiammal who provided her with sufficient funds with which alone she was able to put up the superstructure. The learned counsel for the respondent says that the reasoning which weighed with the learned Judge in treating item 2 as joint family property should have similarly prompted the learned Judge to hold that item 7 is also one such. This would have been possible if the plaintiff by clinching or acceptable material negatived the suggestion made by the second defendant that it was Meenakshiammal, her mother who provided her with funds for both the purchase of the site and for the putting up of the structure thereon which is itemised as No. 7 in schedule A. In fact Exhibits A-2 to A-9 disclose that Meenakshiammal did have transaction with Chakrapani Iyer and Sons and that she was having independent business of her own ; this is not denied by either the plaintiff or any other interested party. It would be therefore difficult for us to set at naught the real title to the property in the second defendant on the basis of such vague and uncertain contentions merely because the second defendant happens to be the wife of the first defendant. We therefore agree with the trial Judge that both the land, the superstructure now comprised as item No. 7 in schedule A should be deemed and accepted to be the independent property of the second defendant. We may also add that the plaintiff himself did not file any cross-objections over this.

16. We now come to items 2 and 3 which were gifted by the father after the so-called reference to arbitration by the members of the joint family which according to the

plaintiff, the first defendant had no capacity or power to do so. It is by now well-established that the father-manager or for that matter a manager of a joint family, has the power to make gifts of the joint family properties provided it is not disproportionate to the value of the totality of the assets and such dispositions, settlements or gifts are for the benefit of the kith and kin of the family. Unless a design, fraud or motive is attributed to such a disposition on the part of the father-manager such gifts are normally accepted and upheld by Courts. What is urged by Mr. Baluswami is that the learned Judge has set aside these gifts in favour of the daughters, defendants 5 to 7, on the ground that such alienations were made after the so-called reference to arbitration for adjudication of disputes which by then arose between the members of the family. It is also equally settled now by a decision of the Supreme Court in *Puttarangamma* v. *Ranganna*[1] that:

> "It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is also immaterial in such a case whether the other coparceners give their assent to the separation or not. It is necessary that the member of the joint Hindu family seeking to separate himself must make known his intention to the other members of the family from whom he seeks to separate. The process of communication may vary in the circumstances of each particular case.",

If in a given situation when disputes have arisen between the members of a coparcenary or a Hindu joint family, any one of the members gives a notice or sends a communication to the others of his intention to separate himself from the family that could be express notice of his intention to do so. Impliedly also this object could be achieved. One illustration for such implied exploitation of the intention of a coparcener or member of a joint family to disrupt the joint family status is by a reference of the dispute amongst the members including himself to adjudication by panchayatdars or arbitrators. It is but natural to accept that if members of a joint family or co-parcenary submit their disputes to arbitrators for a decision and in it is included the determination process by which the partibles are to be separated and the member given possession of such partitioned properties, then undoubtedly it is one of the implied methods by which the members have expressed their intention unequivocally to sever the joint family status.

17. In the instant case, Exhibit A-103 is pressed into service as an exhibit under which there was such an implied expression of the determination of the members of the family of the first defendant to sever the joint family status. We divide Exhibit A-103 into two compartments. The first one is the first page and the subsequent one is a wad of paper attached to it which does not contain the signature of any one of the parties interested but is said to have been signed by them. We shall refer to the wad of paper which is the second compartment in Exhibit A-103 some time later. The first page in Exhibit A-103 however gives us the impression that the parties did express their unequivocal intention to refer their disputes to arbitration and effect a partition in the family. The first compartment of Exhibit A-103 is dated 3rd February, 1966. Based on this the respondents' contention is that the appellant had no authority to execute Exhibits A-104 and 105 in the year 1967, which is long after the date when parties referred the disputes to arbitration under Exhibit A-103. He would also say that the gifts are disproportionate and unreasonable. We are unable to agree with the learned counsel for the respondents that the gifts are so unreasonable and disproportionate to the value of the totality of the estate. On a rough evaluation, the total value of the estate would be more than 3 lakhs. A provision of Rs. 10,000 each to three daughters in such a rich and affluent family by the father-manager could not be said to be either unreasonable or disproportionate to the value of the assets of the joint family but the question is whether he had the authority to so settle the property after the execution of Exhibit A-103. In our view he cannot. When once one of the members of the joint family, may

1. (1968) 2 S.C.J. 668 : A.I.R. 1968 S.C. 1018.

be the son, unequivocally informs his father of his unambiguous desire to sever his connection with the joint family and so disrupts the joint family status then the manager, though he is the father, would be treading on slippery or dangerous ground if he were to assume the garb of managership and deal with the joint family assets in his own right and particularly alienate them or gift them away to others including the kith and kin of the family. Undoubtedly he could have done so prior to the disruption of the status of the family as a joint family. But no sooner such an intention has become open and public, the conduct of the first defendant in having executed the gifts long after the submission of the disputes under the first compartment of Exhibit A-103 to the arbitrators is certainly an act without authority and it would not bind the other members of the family including the plaintiff. We are unable to agree with Mr. Baluswami learned counsel for the appellant, that the gift made in 1967 was only by way of effectuating a promise already made by the father to the daughters at or about the time of their marriage. It would not have been difficult for the first defendant to have gifted this property or made any other provision long prior to the springing up of the disputes as between the members *inter se* but such a gift having been done after the execution of the muchalika under Exhibit A-103, we are unable to uphold these gifts ; but in the adjustment of equities we intend making a reservation in the end in so far as this aspect is concerned.

18. Having thus dealt with the A schedule property the surviving discussion will centre round schedules B and C. We may at the outset point out that the treatment of this aspect by the learned Judge did not appear to be quite satisfactory. We have therefore heard counsel on this aspect fully so as to ascertain whether from the materials on record the movable properties set out in schedules B and C are, firstly, available at all, and secondly, if they are so available, who are entitled to share in them.

19. The learned counsel for the plaintiff respondent mainly relied upon Exhibit A-103 in order to sustain the case of the plaintiff that the movables set out in schedules B and C are available still with the accountable party and that they are to be brought into the common hotchpot for division amongst the sharers. We have already referred to the first compartment of Exhibit A-103. This single sheet paper which is part of Exhibit A-103 is signed by the parties. But the rest of it is fully written out by some one who has not been examined and has not been signed or attested by the interested parties. P.W. 2, one Subbarama Iyer, states that he arranged for a panchayat, that he was one amongst the panchayatdars and that the first compartment of Exhibit A-103 was executed by all the parties before us and he adds that the constituted panchayatdars prepared a list of the joint family properties and that the first and the second defendants and others were examined and they prepared the list. He admits that the lists were not written properly and that some items were left out. When he refers to the signature of the parties and his own signature in Exhibit A-103, obviously it refers to the first compartment thereof.

20. This is also what he says in chief examination. In cross-examination he would say that it was the first and the second defendants who told them about the particulars of the properties and he was not certain as to whether the plaintiff or the first, second or the third defendants mentioned the particulars in the second compartment of Exhibit A-103. He again admits that what all was said was written and that he did not verify the movables with the plaintiff or the third defendant. The plaintiff himself who was examined as P.W. 1 would say that he mentioned in the B schedule what has been stated in Exhibit A-103. We asked the learned counsel for the plaintiff-respondent to refer to some acceptable hypothesis on the basis of which a Court of law could come to the conclusion that on the date when the partition suit was filed the family was possessed of such movables. Though an attempt was made no such materials have been placed before us. As we began, the plaintiff relies solely and wholly on Exhibit A-103 and in particular to the second compartment thereof.

21. The next question which immediately arises for consideration is whether the

second compartment of Exhibit A-103 is a document on which a civil Court can place any reliance. It is admitted that these wads of paper are not even signed by any one. The panchayatdar who was examined candidly says that the particulars therein are to the dictates of one or the other of the parties. Even P. W. 2 has not attested the second compartment of Exhibit A-103. As the plaintiff produced it as a composite document this was admitted by the lower Court and the rubber stamp usually affixed to such documents when it is produced in Court shows that it has been proved by the plaintiff. When the learned Subordinate Judge said that it has been proved by the plaintiff, obviously he meant that it had been identified by the plaintiff. Beyond identifying the second compartment of Exhibit A-103 and besides making assertions thereon without following it up by placing acceptable materials before the Court, for it to act thereon, neither the plaintiff nor his witnesses made any sincere attempt to prove and establish that the contents of the second compartment of Exhibit A-103 are true and acceptable. As we said, the learned counsel for the plaintiff-respondent is unable to place before us any such materials nor has he been in a position to impress on us that the unsigned wads of paper which is an appendix to the first compartment of Exhibit A-103 is evidence within the meaning of the Indian Evidence Act. If therefore the reasonable conclusion which we have to draw in the peculiar circumstances of the case is that excepting for the bare *ipse dixit* and the assertions made by the plaintiff as a co-litigant, there has not been any documentary or oral evidence let in by the interested sharers of the joint family to prove that such a quantum of the movables were available for partition amongst them as on the date of the institution of the motion and that such movables were with one or the other of the contesting or accountable parties and that therefore the litigation has to be processed through to its logical end by calling upon or obligate the persons in such possession of the movables to account for them and after such accounting the movables so brought into the hotchpot be divided amongst the sharers in accordance with their legitimate shares, we are obliged to find that the existence of the 'B' schedule property has not been established. In a case where a person who claims to be a member of a Hindu undivided family seeks for partition of movables but did not take the precaution of securing the appointment of an *ex parte* commissioner at or about the time when the suit was laid so as to get all such materials as is required for the ascertainment and reckoning of such movables in the possession of one or the other of the co-sharers, then it would be difficult for a Court to fairly assess and estimate such movables on the pleadings unsupported by corroborative evidence or acceptable materials. It is in this position that the present litigation stands in so far as the claim for the movables is concerned. Excepting for Exhibit A-103, the plaintiff has no other material on which he could argue or sustain his case about his right to claim a partition of the alleged movables belonging to the family. We are not inclined to disturb the finding of the Court below as regards the right of the family members to keep the jewels which the trial Court found to be in their possession and which are said to be their own properties. As we said, we do not accept the second compartment of Exhibit A-103. If this portion of the sole evidence on which the claim for movables rests is thus brushed aside we are unable to find a case for partition of such non-existing or unproved movables.

22. The learned Judge in so far as schedule B is concerned gave a very curious direction. He would rely upon the writing in the second compartment of Exhibit A-103. This by itself is a wrong step. He would refer to the so-called interim list appended in Exhibit A-103 which states that certain jewels are available in rooms 2 and 3. In the end therefore he directed that among the B schedule properties such of those movables, jewels as are mentioned in rooms 2 and 3 and that are mentioned in items 5 to 86 and the other items of movables mentioned in other items 5 to 86 are available for partition. The direction begs the question. The question is whether there are such movables which are available for partition and the learned Judge does not advert to this aspect. In

our view, there is no evidence to assume that any of the movables set out in schedule B are available for partition. The direction in this behalf made by the learned Subordinate Judge is therefore set aside.

23. As regards C schedule, we have referred to the fact that the third defendant has admitted that he has to account for item 3 in schedule C which gives a list of outstandings payable to the family and which will become an asset of the joint family for being partitioned amongst the sharers. Excepting for the admission of the third defendant, here again we find that there is no proof of the existence of such debts. The plaintiff, in paragraph 15 of the plaint says that in schedule C the outstandings due to the joint family inclusive of the cash are set out in so far as they are known to the plaintiff. In paragraph 19 of the written statement of the first defendant he would deny the existence of many of the items of outstandings mentioned in schedule C and would claim that the major portion of the items set out therein are all amounts which are due to him and that very many of them were discharged long ago and he gives details about the same. In the replication there is no particular treatment of this averment of the first defendant. When the first defendant was in the witness box, he was not even cross-examined with reference to Exhibit A-103 which is the sheet-anchor of the plaintiff's case. The learned counsel for the respondent says that the first defendant was cross-examined on the C schedule items thus :

> " The C schedule items were taken with my money. I have no right in my wife's outstandings. Meenakshi left 75 sovereigns and Rs. 8,000 cash at the time of her death. She had to collect some outstandings also. "

When we called upon the learned counsel for the plaintiff-respondent to point out any other statement in the testimony of either the plaintiff or any other sharer which would touch upon the existence or otherwise of the outstandings set out in schedule C, he was unable to do so. The net result of all this is that the plaintiff on whom the burden is heavy to establish that the outstandings detailed by him in schedule C are outstandings of the family and that they were available to the family on the date of the institution of the action, has miserably failed to speak about it and much less to establish the same. The learned Judge vaguely concludes that some of the outstandings mentioned in schedule C standing to the credit of the second defendant are to be treated as outstandings to the family and holds as follows :—

> "A number of outstandings are shown in C schedule which includes outstandings under items 1 to 27 said to be owned by the family. Among these some items are in the name of the second defendant. I have already held that the outstandings in the name of the second defendant came out of the joint family funds. Therefore that should be taken into consideration for partition. So far as items 28 and 29 which are stated to be cash accounts are concerned they must be separately found out by the commissioner in the final decree. Items 1 to 27 of C schedule in the hands of defendants 1 and 2 the monies standing with the defendants 1 and 2 at the time of the suit are available for partition."

What is the basis for the conclusion of the learned Judge to hold that the C schedule properties have been proved to be in existence and as assets of the joint family has not been made out. We asked in vain the learned counsel for the plaintiff to sustain such a situation. The result is that the outstandings mentioned in C schedule also have to be taken as items which have not been proved to be in existence and therefore not being available on the date of the suit for partition and which could in the ultimate analysis be divided amongst the sharers entitled to the same. We have already prefaced by saying that the above conclusion would not apply to that item of outstandings which has already been admitted by the third defendant as one which he has to account for.

24. The only question that remains for consideration is whether the decree for accounting granted by the Court below as against the first and the second defendants is correct. No authority has been placed before us to sustain the conclusion of the

learned Judge that the father-manager of an undivided joint family is to account for the prior dealings of his in the family. This would be a strange position. The father as manager of a Hindu joint family has a peculiar status equivalent to that of a *patria potestas* of the family and the proposition that the members of such a coparcenary when they sue for partition cannot ask for an account from their father-manager is well settled as he enjoys a superior position in the family. His absolute and exclusive control over the family income and expenses is of the peculiar characteristics which are attached to such managership as father in the joint family. The head of the family cannot in general be called upon to defend the propriety of his past transactions in relation to the family. In so far as his liability to accounting is concrned in Raghvachariar's Hindu Law, 6th Edition, the learned author quoted the ratio in *Narayanaswami Iyer* v. *Ramakrishna Iyer*,[1] thus :

> "In the absence of proof of direct misappropriation or fraudulent and improper conversion of joint family monies to the personal use of the manager he is liable to account only for what he received and not for what he ought to, or might have received if the said monies had been profitably dealt-with."

No case of misappropriation or fraud has been pleaded or proved by the plaintiff as against his father. The normal conclusion therefore is that the first defendant as father-manager was prudently dealing with the properties of the family. If that is the basis and the fair conclusion, that ought to be arrived in the instant case, then the question of accounting for the past mesne profits of the A schedule properties will not therefore arise. We have already expressed the view that there is no proof that the movables set out in schedule B and C have been proved to be available for division amongst the members. On the principle that a father-manager unless his actions were challenged on the ground of fraud etc is not accountable for his past transactions, the direction as to accounting given by the Court below is modified to the effect that the first defendant shall account for the mesne profits of the joint family properties held to be so in our judgment as above from the date of institution of the action till the properties are divided by metes and bounds and handed over to the respective parties

25. The plaintiff did not ask for an account as against the second defendant, but the learned Judge gave such a direction No authority has been shown before us to hold the mother, wife of the manager of the joint family to render an account of the income or mesne profits of the joint family properties. We set aside this part of the judgment of the Court below which directs an accounts as against the second defendant.

26. While concluding the Appeal No. 286 of 1970 we are bound to observe that it would be unfair to disturb the possession of the properties with defendants 5, 6 and 7, who are the daughters and female members of the family and sisters of the plaintiff. Having regard to the affluence of the family, but as such gifts cannot technically stand as they were made at a time when the notice of intention to sever the joint status was given by the plaintiff, though not expressly but by necessary implication, we direct that these properties which are the subject-matter of Exhibits A-104 and 105 be allotted to the share of the first defendant in the final decree so that the gifts may be sustained as the gifts voluntarily made by him from and out of the share to which he is entitled to in the joint family. As regards Appeal No. 287 of 1970 preferred by the mother, we have already held that she is not responsible for accounting and that is the main grievance of the appellant in that appeal, and to this extent this appeal is allowed. As regards the appeal preferred by the defendants 5 to 7 who are the daughters, we are unable to assist the appellants since in law they are not entitled to gain title over the properties gifted to them on the bare footing of the settlement deeds executed by their father under Exhibits A-104 and 105 but in view of the direction which we have made in the matter of the adjustment of the equities, no further

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1. (1965) 1 M.L.J. (S.C.) 78 : (1965) 1 An. W.R. (S.C.) 78 : (1965) 1 S.C.J. 522 : (1964) 7 S.C.R. 490 : A.I.R. 1965 S.C. 289.